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No. 17,313

United States Court of Appeals
For the Ninth Circuit

FRANCIS L. ROONEY and IRENE ROONEY, his wife,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANTS FRANCIS L. ROONEY AND IRENE ROONEY

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BRIEF FOR APPELLANTS FRANCIS L. ROONEY AND IRENE ROONEY

This is an appeal to the United States Court of Appeals for the Ninth Circuit from a final judgment of the United States District Court for the Northern District of California, Northern Division, rendered November 14, 1960.

STATEMENT OF JURISDICTION

These proceedings were commenced by appellants pursuant to the provisions of Section 6532 of the Internal Revenue Code of 1954. 28 U. S. Code, 1346(a).

STATEMENT OF THE CASE

This controversy involves a proper determination of appellants' liability for federal income taxes for the years 1952-1953 and 1954. Appellants sustained a net operating loss in the year 1954 which was carried back and deducted from income for the years 1952 and 1953 in accordance with the provisions of Section 172 of the Internal Revenue Code of 1954 (formerly Section 122, Internal Revenue Code, 1939). The Commissioner thereafter determined that there were deficiencies in income tax for those years, and for 1954, and after paying them appellants filed claims for refund for each of the years involved, copies of said claims being incorporated in the record on appeal in this case, which were each ultimately denied by the Commissioner in his Notice of Disallowance.

The facts of this case, other than the ultimate findings of the District Court, are not substantially in dispute. Appellants are individuals who at all times involved in this proceeding were residents of the County of Sacramento, California. They filed their income tax returns on a calendar year basis at San Francisco, California.

SPECIFICATIONS OF ERROR RELIED UPON

The appellants specify each of the following as error on the part of the District Court:

(1) That the allocation of expenses to appellants' successor corporation achieved the equating of income and expenses which would have resulted if appellants

had dealt with their controlled corporation as they would have with a stranger corporation.

(2) That the allocation resulted in a "matching" of income and expense, and, therefore, more clearly reflected income.

(3) That the entities involved had the element of "common control" required by Section 45.

(4) That the principles of the pertinent authorities do not establish that the action of the Commissioner under all the facts and circumstances was arbitrary and erroneous.

(5) That appellants were not entitled to deduct the expenses incurred by them individually and to carry back their net operating loss as expressly authorized by the provisions of Section 122 of the Internal Revenue Code of 1939.

(6) That appellants were not entitled and required to report the transaction in question in accordance with the provisions of Section 112(b)5 of the Internal Revenue Code of 1939 relating to tax free incorporations.

(7) That appellants failed to sustain their burden of proof as to the amount of the tax refund owing.

STATEMENT OF FACTS

Appellants were hop ranchers who, in the early spring of 1954, consulted their accountant regarding the formation of a partnership or a corporation with

an eye toward developing a program for transferring an interest in the family business to two adult sons and lessening the immediate impact of taxes upon the income of their business.

At the suggestion of the accountant, appellants consulted an attorney who advised that their objectives could best be achieved by incorporating the business. They organized a corporation on May 27, 1954, for that purpose. Pursuant to a permit from the California Corporations Commissioner, the corporation issued its capital stock in exchange for the assets of the hop growing business of appellants, subject to liabilities, as of July 31, 1954. On that date, the assets of the business included a partially matured crop. Because of Section 112(b)(5) of the Internal Revenue Code of 1939 (I.R.C. 1954, Sec. 351), no gain was recognized on the transfer. During the period January 1, 1954, to July 31, 1954, the proprietorship had incurred substantial expense in planting and cultivating the crop. Since the crop had not yet matured, the proprietorship realized no income from it. As a result, the method of accounting regularly used by the proprietorship reflected a net loss for the period. During the period appellants incurred the expenses of planting and cultivating the crop, the corporation owned no assets and engaged in no business activity whatsoever.

NATURE OF THE CONTROVERSY

The loss sustained in the final accounting period of the proprietorship was, in accordance with Section 122 of the Internal Revenue Code of 1939, carried back to prior years and resulted in over-payments of taxes for those years with respect to which a claim for refund was duly filed.

This claim was allowed by the Commissioner of Internal Revenue who later reversed his position and asserted deficiencies in tax for the years covered by the refund claim upon the ground that the expenses admittedly incurred by the proprietorship long prior to the time the corporation commenced business activity were nevertheless allocable to it. The allocation of these expenses to the successor corporation was made under the purported authority of Section 45 of the Internal Revenue Code of 1939, the pertinent provisions of which read as follows:

> "* * * the Commissioner is authorized to distribute, apportion or allocate gross income, deductions, credits, or allowances between or among [businesses owned or controlled directly or indirectly by the same interests] * * * if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades or businesses."

The allocation resulted in the crop expenses of 1954 and 1955 being included in the corporation return for the fiscal period August 1, 1954, to July 31, 1955, while the same return included only the income from the crop sold in the fall of 1954.

SUMMARY OF ARGUMENT

I.

A. The action of the Commissioner in invoking Section 45 fails to meet the avowed purpose of that section, namely to more clearly reflect income, as it does not achieve a matching of income and expense. Rather, it results in the expenses of raising two crops being offset against the sale proceeds of one crop.

B. Nor is this action justified by any concept that the use of Section 45 puts appellants in the same position as they would have been in an arm's length transaction. In fact, appellants would have received more favorable tax treatment in an arm's length transaction, irrespective of Section 45, and the application of that section places them in the worst possible tax position.

C. Controlling authority demonstrates that expenses cannot be allocated in a tax-free incorporation and that the attempted invocation of Section 45 here, being both novel and aberrational from the principles of the decided cases, is arbitrary and erroneous.

II.

Sustaining this allocation has the same effect as requiring appellants to inventory an unharvested crop, a result specifically forbidden by the Commissioner's own regulations and the decided cases.

III.

Because appellants and their corporation represented successive rather than parallel entities, the

"common control" required before Section 45 can have any application was not present in this case.

IV.

Appellants have established, through the admissions of appellee, the exact amount of the refund to which they are entitled as a result of the Commissioner's unjustified allocation of expenses and the consequent denial of the refund owing to appellants.

THE ISSUE OF THE CASE

The Commissioner does not dispute that the expenses incurred by appellants in growing the crop up until the time it was transferred to the corporation in exchange for its stock were, in accordance with its regular method of accounting, deductible by them. Nor does the Commissioner dispute that the gain to appellants arising from the transfer of, inter alia, the unmatured crop to the corporation was properly deferred in accordance with the clear and unambiguous language of Section 112(b)(5) of the 1939 Code. The sole question at issue here is whether in the circumstances of this case the Commissioner was authorized by Section 45 not only to artificially shift income and expense to place the appellants in the worst possible tax position but also to prevent the normal operation of Section 112(b)(5).

ARGUMENT

I

The Internal Revenue Service is making an entirely new contention in the present case—a contention completely at odds with the principles of the decided cases and representing a radical departure from accepted farm accounting principles. There are no prior cases holding that a tax free incorporation can be the basis for disallowing expenses incurred in connection with the property transferred.

It must be made clear at the outset that appellants' transaction never presented any threat of permanently immunizing gain or income from reach of the taxing power. The Commissioner did not need to invoke Section 45 to avoid any such threat. There would never be ultimate immunity from tax here; the most that would obtain would be deferment of tax liability. Moreover, as will be shortly demonstrated, the ultimate tax impact on appellants (even without any "allocation" by the Commissioner) would have been *more severe* in the context of this tax-free transfer than in a similar but arm's length transaction.

To understand the foregoing principles, we need but assume there were no allocation by the Commissioner. The eventual tax position of appellants and the corporation would then develop as follows: (1) appellants would have incurred expenses without offsetting income in 1954, giving rise to their net operating loss; (2) the corporation's revenues from the sale of its first crop in the fall of 1954, less the expenses of

harvesting, would be offset by the subsequent expenses of planting and cultivation incurred in the spring of 1955. (The corporation's taxable year ran and still runs from August 1 to July 31.) This cycle would have been repeated each taxable year, with net revenues from the harvest and sale each fall being offset by planting and cultivating expenses of the spring following. In the corporation's final taxable year, receipts from sale of its fall crop would be offset only by harvesting expenses, since the corporation would plant no new crop the following spring. Those receipts would incur tax at ordinary income rates. In other words, the corporation would have never obviated payment of ordinary income tax on receipts from that final crop against which no ensuing planting expenses could be balanced. And, indeed, appellants never intended that the corporation obviate such ultimate liability.

The Commissioner would use his discretion to prevent the postponement of tax just described. He would—despite utter lack of authority holding that a tax-free incorporation can be the basis for disallowing expenses incurred in connection with the property transferred—preclude the normal operation of Section 112(b)(5). He would do all of this, and also put the taxpayer in the worst possible position, while failing to approximate the basic concept of Section 45.

For Section 45 speaks of clearly reflecting income. The Commissioner's and the District Court's concept is that the cost of producing a crop should be matched against the proceeds of its sale. But the Commis-

sioner's action would give the corporation in the taxable year 1954-55, deductions for the expenses of raising *two* crops—that planted in the spring of 1954 and that planted in the spring of 1955—and the income from the sale of only *one*. Since the invocation of Section 45 here achieves only a distortion of expenses vis-a-vis income, there is no justification for its use.

Moreover, there are many situations in which the government requires a separation of the proceeds of the sale of a crop and the expenses of producing it. For example:

1. Where crops are held over and not sold until the succeeding fiscal year—or even, in the case of a cash basis taxpayer, when they are sold but payment is deferred. See

Amend, 13 T.C. 178, acq. 1950-1 Cum. Bul. 1,

cited with approval in

Rev. Rul. 60-31, 1960-1 Cum. Bul. 174, 178;

2. Where a new entity first goes into the farming business; and

3. Where a farmer dies prior to sale of the crops. Compare

Rev. Rul. 58-436, 1958-2 Cum. Bul. 366,

and

Estate of Tom L. Burnett, 2 T. C. 897, acq. 1944 Cum. Bul. 4.

In upholding the Commissioner, the District Court relied on the proposition that Section 45 could be invoked to reach a tax result consonant with that which

would have obtained in an arm's length transaction. But the absence of any such consonance in this case is obvious. Appellants would have had no tax advantage over an arm's length transferor irrespective of the effect of Section 45. If Section 45 is superimposed on this situation, then appellants suffer the worst possible result.

To understand the comparison, we need only visualize what an arm's length situation would have entailed. In a transfer to a non-owned corporation, appellants would have placed a value on the unharvested crops. (As a matter of fact they would have been so required by law. *Watson v. Commissioner* (1953) 345 U.S. 544, 97 L. Ed. 1232.) This value would have determined the number of shares of stock acquired in the exchange. The receipt of these shares and the value assigned to them would have created a taxable capital gain (I.R.C., 1954, Sec. 1231(b)(4)). The net taxable gain would have been the difference between the value received and the cost of producing the crop, which would have to be capitalized, rather than expensed, in the year of sale (I.R.C. 1954, Sec. 261). Transfer to a non-owned corporation thus would have achieved conversion of an ordinary income item (the crop) into a *capital asset.*

In contrast, because the transfer in issue was to a wholly owned corporation,[1] the crop retained its character as stock in trade, and the corporation paid ordinary income tax when the crop was sold. We have already seen (p. 9) how the corporation would, in any event, have to pay *ordinary income tax* on its

final harvest revenues. Weighing the capital gain tax against the ordinary corporate income tax, we find the impact of dealing with their wholly-owned transferee puts appellants in a *less favorable* tax position than would have resulted from the "arm's length" situation. True, there would be postponement of the ordinary income tax liability under appellants' arrangement. But when cut, the tax slice would be substantially bigger.

But the Commissioner is not satiate with this bigger slice. His ingenious invocation of Section 45 places appellants in the worst possible tax position. This is so because appellants are denied the right to avail themselves of the provisions of Section 122 which permit the offset of the expenses incurred by them as individuals against income earned by them as individuals.

It was upon a misapprehension of the nature of the tax result to be accorded an "arm's length transaction" that the District Court sought to distinguish the case of *Simon J. Murphy Co. v. Commissioner of Internal Rev.* (6th Cir. 1956) 231 F. 2d 639. There a corporation distributed its assets, consisting of real properties, in liquidation to its shareholders on January 11, 1950. On January 1, 1950, substantial real estate taxes had become a lien on the properties distributed. The transferor, an accrual basis taxpayer,

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[1]The control of the successor corporation by appellants at the date of transfer brings into play I.R.C. 1939, Section 112(b)(5), presently I.R.C. 1954, Section 351, which provides for the nonrecognition of gain or loss.

deducted the full amount of the taxes thereby sustaining a net operating loss for 1950, since little income was realized during the eleven day period. For reasons hereinafter discussed (p. 17), the Court of Appeals held that the Commissioner had abused his discretion in allocating the expenses of the transferor to the transferee.

While it is true as the District Court points out, that under existing law there were no provisions for the ratable allocation of real property taxes as between a vendor and a vendee, it is not true that the same tax result reached in the *Murphy* case would have obtained in an arm's length transaction. Surely, as in the instant case, the transferor would have insisted upon reimbursement for a pro-rata portion of the real property taxes paid had the transfer been to an independent third party. A precise analogy cannot be drawn, of course, since a distribution in liquidation—like a tax-free incorporation—presupposes that no independent party is involved. But, a disposition of real properties on which taxes had been paid would, as a matter of simple economics, involve bargaining for reimbursement, thus adding to the gain realized on the sale. More gain would entail more tax or, if expenses exceeded gain, a reduction in the loss. The then-existing absence of provisions for allocating real property taxes between vendor and vendee thus affords no basis for distinguishing the *Murphy* case.

What appellants have shown to this point is that both the Commissioner and the District Court used

the arm's length rationale in a mistaken manner. But the weight given the arm's length rationale by the District Court was a pivotal error. It was error because the *very basis of any tax-free transfer or reorganization is that it not be considered an arm's length sale or exchange.* The transferee has no alternative save to accept the tax basis of the transferor, regardless of what valuation figures might otherwise be used. Indeed, where taxpayers have tried to achieve taxable transfers to controlled corporations by the same mechanics as in this case, the Commissioner has treated the transaction as a tax-free exchange.

If the basic premise of an arm's length test has any validity, it should apply to the depreciables transferred, as well as the crop expenses, for they would not have been sold to a stranger for less than book value. But such complete application is, rightly, not urged in this case. It is clear, then, that the arm's length test cannot be used to alter the consequences of what is otherwise a tax-free transfer.

That there has been a flagrant misuse of Section 45 has already been shown by the fact that the allocation results in placing appellants in the worst possible tax position (p. 12). As was also shown, a similar effort by the Commissioner was struck down in the *Murphy* case (p. 13).

Additional authority that the action of the Commissioner constituted an abuse of his discretion is *Thomas W. Briggs* (1956) 15 TCM 441, 451. Petitioner had transferred accounts receivable to a controlled corporation and the Commissioner attempted to allocate the

income to the transferor under the authority of Section 45. The Tax Court held that the bona fides of the transaction were demonstrated by the absence of motive to evade taxes and the payment by the corporation of taxes on the income from the receivables, and it rejected the proposed allocation.

Another case involving facts parallel to those of the present case is *Mabee et al. v. Dunlap, et al.,* 51-2 USTC, paragraph 9366. There, the taxpayer transferred partially completed drilling contracts having a value in excess of $200,000.00 to a controlled corporation. The Commissioner was not allowed either to allocate to the corporation the drilling expenses incurred prior to transfer or to charge to the individual income realized by the corporation.

These are the only cases of which appellants have knowledge dealing with the question of an attempted disallowance of expenses or reallocation of income in the context of a 112(b)(5) incorporation, and the holding of both are that such action is not a permissible exercise of discretion.

The relative novelty of the Commissioner's contention is further exemplified by the small number of reported cases where Section 45 has been applied to transfers of agricultural commodities.

A leading case where Section 45 was not invoked is *Diamond A Cattle Co. v. Commissioner* (10th Cir. 1956) 233 F. 2d 739, in which a corporation distributed livestock to its sole shareholder on August 15th. Since almost all sales of livestock were (as was customary) made between September 1 and December

31, the corporation sustained a net operating loss resulting from expenses incurred prior to the distribution date. The Tenth Circuit Court of Appeals held that it could carry back such loss despite the sole shareholder's admission that he caused the liquidation to achieve a net operating loss. The entities and facts of the *Diamond A* case are identical to those of the instant case except that here the transfer was from an individual to a corporation.

The opinion of the District Court is misleading in its attempted distinction of *Diamond A* because a quote is used out of context. The District Court rightly observes that Section 45 was not in issue therein; it proceeds to state that:

> "As the taxpayer accrued the costs of raising the cattle, 'and in so accounting accrued and reported large amounts of income not received, representing to some extent at least, the increase and growth of the animals in its herds prior to the sale of those particular animals,' his situation was entirely different from that of the plaintiff's in the instant case."

The opinion thus appears to equate accrual of costs with inventorying of the taxpayer's livestock; in truth, there is no connection between the two. Moreover, inventorying—which appellants here were not permitted to do (post, pp. 21-25)—resulted in only a partial absorption of expense, and a net operating loss was generated by the transfer.

What the *Diamond A* case holds is simply that expenses must be reported in conformity with the history

of a transaction and the taxpayer's regularly employed and accepted method of accounting and not be subject to whimsical disallowance by the Commissioner.

The net result of the action of the Commissioner thus appears to be solely the frustration of tax consequences which Congress intended appellants should enjoy. As the court in the *Murphy* case, supra, held (231 F. 2d 639, at 645):

> "It is true that the dissolution of Murphy Company had tax consequences unfavorable to the Government. But as shown by the cases hereinabove referred to that does not authorize action under Section 45. Nor was dissolution illegal, improper or fraudulent. It was permissible corporate action which could have been taken by any corporation."

The principle applies with equal force to the required tax free incorporation of appellants and the resultant loss sustained by them.

Both the District Court and the Commissioner rely almost entirely upon the holding in *Central Cuba Sugar Co. v. Commissioner of Int. Rev.* (2nd Cir. 1952) 198 F. 2d 214. But neither take cognizance of the peculiar facts of that case. In the *Central Cuba Sugar* case taxpayer, a corporation, was engaged in raising and selling sugar. Pursuant to a plan of reorganization, taxpayer transferred all of its assets to a successor concern in November, having incurred substantial expenses in planting the crop later sold by its successor. The Commissioner's application

of Section 45 was upheld by the Court of Appeals (which reversed the Tax Court's holding for the taxpayer) on the ground that the division of the fiscal year in November resulted in distorting the income picture of a generally profitable operation. But in that case the transferee was a foreign corporation, the income of which could *never* be reached by the taxing authorities of this country. This is not true with regard to the income of the corporation owned by the appellants herein. (For a further discussion of the factual disparity between the instant case and *Central Cuba Sugar,* see post, p. 25.)

The court in *Central Cuba Sugar* relied upon the decision of the Fifth Circuit in *Jud Plumbing & Heating v. Commissioner of Int. Rev.* (1946) 153 F. 2d 681, and *Standard Paving C. v. Commissioner of Internal Rev.* (1951) 190 F. 2d 330, which was decided by the Tenth Circuit. Each of these cases involved a transferor corporation engaged in the construction business which customarily reported income on the "completed contract" method. In each case, although the contracts had been transferred prior to the date of completion, the courts held the income could be pro-rated to the date of transfer and attributed to the transferor corporation.

These cases merely hold that accounts receivable of a transferor may be treated as income upon liquidation of a corporation. Such treatment merely places the transferor on another recognized accounting method, i.e. the recognized percentage of completion method and results in the receivables being taxed

at ordinary income rather than capital gains rates. These cases are not relevant to the deductibility of expenses already incurred. Moreover, their rationale would require these appellants to adopt a prohibited method of accounting (see post, pp. 21-25).

Except for *Central Cuba Sugar,* the Commissioner has not generally relied upon Section 45 in transfers of agricultural commodities, but instead rested his attack on other provisions of the Code. In issue have been conversions of ordinary income items to capital assets through distributions of stock in trade to shareholders. The Commissioner found sufficient justification neither to attack these transfers under Section 45, nor to challenge the deductibility of expenses incurred by the transferor in producing the assets.

For example, in *Gensinger v. Commissioner* (7th Cir. 1953) 208 F. 2d 576, taxpayer liquidated his wholly owned corporation and distributed its assets, consisting of harvested fruit crops, to himself. Taxpayer's disposition of the harvested crops was treated as a capital gain, while a sale of the same crops by the corporation prior to distribution would have resulted in ordinary income. The critical issue was whether an effective transfer of the assets had been made to the taxpayer prior to the sale and the court found that there had been.

Similarly, in *Louisiana Irrigation and Mill Company* (1955), 14 TCM 1252, the Commissioner unsuccessfully attempted to treat a dividend in kind of rice, which was sold by the recipient shareholders,

as the income of the corporation, relying on Section 22(a) of the 1939 Code, now Section 61 of the Internal Revenue Code of 1954.

In *U. S. v. Horschel* (9th Cir. 1953) 205 F. 2d 646, a distribution of an apple crop in liquidation was attacked as being an anticipatory assignment of income. This argument was rejected by the court on the ground that the assets themselves had been distributed and, accordingly, income from the sale thereof could not be taxed to the liquidating corporation.

The Commissioner has made but one effort to use Section 45 in the context of a transfer of agricultural commodities by a corporation to its shareholders. This effort failed. In *Burrell Groves, Inc.,* (1951) 16 T.C. 1163, a corporation sold its assets, including unharvested crops, to its shareholders. Petitioner and its shareholders had not placed any value on the crops. The Commissioner allocated to the corporation an amount of ordinary income which he asserted was equal to the value of the crops. The Commissioner argued that the parties would have set a value in an arm's length transaction and that, accordingly, it was permissible to increase the amount of the corporation's income under Section 45. The Tax Court summarily rejected this contention, both on the grounds that the issue had been improperly raised and that there was no evidence in the record to support such an allocation.

Thus, it is clear that the singling out of the good faith transaction of these appellants is unwarranted

as a revenue measure, not in accordance with the theory of Section 45 and an aberration from the principles inherent in the pertinent authority. To sustain such novel and arbitrary attacks on a type of transfer that takes place in countless instances and conforms in every particular with applicable provisions of the Code will leave both taxpayers and their advisors without a shred of certainty as to the availability of unambiguous provisions of the law.

II

The District Court erroneously concluded that appellants were not entitled to deduct the expenses incurred by them individually in connection with the growing of the crop in question and to carry-back their net operating loss as permitted by Section 122 of the Internal Revenue Code of 1939. It is not in dispute that the expenses allocated by the Commissioner to the corporation were actually incurred by the appellants individually. Although these taxpayers were on an accrual basis, it is immatetrial whether they were on a cash or accrual basis as the money had actually been expended.

The only other accounting method which is available to farmers is the so-called "crop method", which requires that a farmer be engaged in producing crops which take more than a year from the time of planting to the time of gathering and disposing.

In the regulations under the 1954 Code that method is provided for in Subdivision (c) of Section 1.61-4. If a particular crop qualifies for this method of reporting, then the entire cost of producing the crop must be taken as a deduction for the year in which the gross income from the crop is realized, and not earlier. The record is clear that this method is not available in the case of hops which are planted in the spring and harvested in the fall.

Accordingly, appellants had no alternative but to deduct these expenses at the time and in the fashion which they did. *W. P. Sewell, et al.* (1944) 3 TCM 106, 118-119. In the *Sewell* case the taxpayer attempted to deduct in 1934, the year in which the crop was harvested, planting and cultivating expenses incurred in 1933. Because the crop did not qualify for the crop method, the expenses were required to be deducted in the year in which incurred. While Section 45 was not in issue in that case, the rationale of the decision is pertinent to the situation of these appellants. The Tax Court held that the only appropriate time at which expenses could be deducted was the accounting period in which they were incurred. In the *Sewell* case that accounting period was marked by the end of the calendar year.

If the purpose of Section 45 is to place these appellants on a parity with an uncontrolled taxpayer such as Sewell, then the only appropriate time at which appellants' expenses could have been deducted was the accounting period which included January 1 to July 31. A different entity operating in a successive ac-

counting and fiscal period should be prohibited from taking these deductions on the same theory that Sewell was.[2]

The practical result of this allocation was to require that appellants inventory the value of these unharvested crops, a result which both the courts and the Commissioner have consistently opposed.

The Commissioner has made his position on unharvested crops quite clear in a ruling under the 1921 Act (I.T. 1368, I-1 C.B. 72) which reads as follows:

> "While farmers may report their gross income upon the accrual basis (in which an inventory to determine profits is used), they are not permitted to inventory growing crops for the reason that the amount and value of such crops on hand at the beginning and end of the taxable year cannot be accurately determined. If a farmer is engaged in producing crops which take more than a year from the time of planting to the time of gathering and disposing, the income therefrom may be computed upon the crop basis; but in any such case the entire cost of producing the crops must be taken as a deduction in the year in which the gross income from the crop is realized. (See arts. 38 and 1586.) Nurserymen may inventory their young trees only where they have reached a marketable size and stage of development and where the market value is definitely known. If

[2]It should be pointed out that there is absolutely no issue in this case with respect to the validity of the corporation's existence. It was organized for and engaged in business activities; consequently, it must be recognized as a separate entity. *National Carbide Corp. v. Commissioner* (1949) 336 U. S. 422, 428-429; *Moline Properties, Inc. v. Commissioner* (1943) 319 U. S. 436, 439; *O'Neill v. C.I.R.* (9th Cir. 1959) 271 F. (2d) 44, 49.

> desired, the farm-price method of inventory described in article 1586 of Regulations 62 may be adopted."

The Commissioner has never deviated from this official position taken in I.T. 1368. Such official position is recognized in the following subsequent authorities and I.T. 1368 is cited in most of them: *Irrgang v. Fahs,* 94 F. Supp. 206 at 211 (D.C. Fla. 1950), holding that under I.T. 1368 citrus fruit not yet harvested from growing trees on plaintiff's land could not be included in inventory; *Amling-De Vor Nurseries, Inc. v. U.S.,* 139 F. Supp. 303 (D.C., N.D., Cal., 1956); *Perry v. U.S.,* 58-2 U.S.T.C. Par. 9587 (D.C., Miss., 1958); and *W. Cleve Stokes,* 22 T.C. 415 (1954), Acq. 1954-2 C.B. 5, holding that for the taxable years 1946 to 1949, I.T. 1368 was applicable to a nurseryman growing plants and shrubs.

The mechanics which demonstrate that the action of the Commissioner is tantamount to requiring appellants to inventory their unharvested crops are as follows: if it were permitted to inventory the unharvested crop, the fair market value thereof at the date of transfer would be added to the inventory account, and "cost of goods sold" would be reduced by that amount.

Thus, the expenses of appellants would be reduced by the fair market value of the unharvested crop. The Commissioner has achieved exactly the same result by denying appellants the deduction for expenses actually incurred by them.

In this connection, it is highly significant that the action of the Commissioner in the *Central Cuba Sugar* case did not have the result of requiring the transferor there to use a prohibited method of accounting. The deferral of an expense item by its allocation to the transferee corporation was perfectly permissible insofar as appropriate accounting methods are concerned, as the crop there was sugar cane, which requires more than one year from the time of planting to the date of gathering of and disposing. Accordingly, the crop method described above could have been used by the transferor corporation.

That appellants have, in effect, been forced to inventory the unharvested crop is but further evidence that the allocation in question was arbitrary and improper, as it results in the contravention of the accounting regulations promulgated by the Commissioner himself.

III

In its Finding of Fact No. 13 (R. 29) and by implication from its opinion (R. 22) the District Court erroneously concluded that there was present under the facts of this case the element of common control required by Section 45.

It is required that the control exist during the entire period in which the allocated item accrues. It was not until the transfer of assets to the corporation, effected as of July 31, 1954, that the corporation became a viable entity. Prior to that date, the appel-

lants had nothing which they could control as there existed only the vacuous corporate shell.[3]

The record is uncontroverted that the expenses here allocated were all incurred prior to the transfer of assets (R. p. 58, 73-74). Therefore, during the period in which the allocated item accrued, there was no dual operation over which appellants could exercise the arbitrary type of deflective control which Section 45 is designed to prevent.

Appellants have been unable to find any case involving Section 45, or its successor section, in which this element of common control did not exist during the entire period.

For a recognition of this principle, see *The Friedlander Corporation* (1955) 25 T.C. 70, in which the Tax Court carefully spelled out the nature of the common ownership during the entire period.

Further, the regulations under Section 45 of the 1959 Code, reg. 118, Secs. 39.45-1(b):

> "The purpose of Section 45 is to place a controlled tax parity with an uncontrolled taxpayer, by determining, according to the standard of an uncontrolled taxpayer, the true net income from the property and business of a controlled

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[3]Even if it be assumed that the corporation assumed an independent existence for purposes of Section 45 on May 27, 1954, the date on which its Articles were accepted for filing by the Secretary of State of the State of California, the record still indicates that the expenses of planting and cultivating the crop were incurred in the "early part of the year" (R. p. 58). Due to the rather unusual admission, by stipulation, of a proposed format of testimony to be given by Mr. Rooney, the period in which such expenses are incurred is not pinpointed to a date prior to May 27th.

> taxpayer. The interests controlling a group of controlled taxpayers are assumed to have complete power to cause each controlled taxpayer so to conduct its affairs that its transactions and accounting records truly reflect the net income from the property and business of each of the controlled taxpayers. * * * The standard to be applied in every case is that of an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer."

In determining whether or not appellants here dealt with their successor corporation "at arm's length" in allocating the accrued expenses, it is obvious that two taxable entities must have existed at the time of such accrual or there could have been no dealings at all. As has been demonstrated, there was no corporation in existence at such time with which the appellants could deal.

IV

In its Findings of Fact Nos. 2 and 3 (R. 25-26), and its Conclusion of Law No. 5 (R. 30), the District Court suggests that appellants have not sustained their burden of proof. There is no mention of this in the court's opinion.

However, Finding of Fact No. 2 (R. 25) sets forth that appellants have paid the deficiencies of $22,553.02 together with statutory interest thereon to date of payment as a result of the deficiencies proposed by the District Director of Internal Revenue resulting from the allocations in issue here. Thus, the court

has found the exact sum which the Commissioner placed in issue and the fact of appellants' payment of that sum, which establishes with exactitude the amount appellants are entitled to recover.

CONCLUSION

Contrary to the objectives which Section 45 by its terms is designed to achieve, its application to the facts of the instant case results in a distortion of the true income and expense picture of the entities involved. Further, to permit such a novel and arbitrary employment of the Commissioner's alleged "discretion"—contrary to the principles of germane cases—would result in requiring appellants to report on a prohibited method of accounting. Such a precedent could generate serious injustice in manifold instances, while not in any way required to protect tax revenues.

Dated, San Francisco, California,
July 3, 1961.

Respectfully submitted,
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No. 17,313

IN THE

United States Court of Appeals

For the Ninth Circuit

FRANCIS L. ROONEY and IRENE ROONEY,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the Judgment of the United States District Court for the Northern District of California

BRIEF FOR THE APPELLEE

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OPINION BELOW

The District Court's memorandum opinion and order (R. 20-24) is reported at 189 F. Supp. 733. The court's findings of fact and conclusions of law (R. 24-30) are not officially reported.

JURISDICTION

This appeal involves federal income taxes. The taxes in dispute, amounting to $22,553.02, were paid on November 20, 1956. (R. 4, 18, 25.) Claims for refund (R. 6-15) were filed on January 28, 1957 (R. 26) and were rejected on June 9, 1958 (R. 27). Within the time provided in Section 3772 of the Internal Revenue Code

of 1939 and Section 6532 of the Internal Revenue Code of 1954, and on October 17, 1958, the taxpayers brought an action in the District Court for recovery of the taxes paid. (R. 3-17.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The judgment was entered on November 14, 1960. (R. 31.) Within 60 days and on January 6, 1961, notice of appeal was filed. (R. 32.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the taxpayers carried their burden of showing their correct tax liability.

2. Whether the District Court was correct in holding that the Commissioner's allocation of expenses between taxpayers and their wholly-owned corporation was necessary to reflect income clearly and was proper under Section 482 of the 1954 Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Regulations may be found in the Appendix, *infra.*

STATEMENT

The facts as found by the District Court (R. 24-29) may be summarized as follows:

The taxpayers, Francis and Irene Rooney, are husband and wife, residing in Sacramento County, California. They are hop farmers. During 1952 and 1953

they raised profitable crops of hops. In 1954 they also raised a profitable crop. The taxpayers transferred their 1954 crops together with other farm assets, to their wholly-owned corporation known as F. L. Rooney, Inc. This transfer was made as of July 31, 1954, and the crop was sold in exchange for all of the stock of that corporation. Prior to the transfer the taxpayers had incurred expenses in raising the crop and they deducted these expenses on their 1954 return. (R. 25, 27-28.)

Since the taxpayers reported no income from the transfer of the crop and other farm assets to their wholly-owned corporation but did report the expenses, they showed a net operating loss for 1954 on their individual tax return. The 1954 crop was harvested between mid-August and the first of September, 1954, and their corporation reported all of the income from its sale without any of the expenses of raising it. (R. 25, 28.)

The taxpayers' net operating loss for 1954 gave rise to their present claim for refund and this suit. They also attempted to carry the net operating loss back to the years 1952 and 1953. The District Director of Internal Revenue, in order to reflect clearly the income of taxpayers and their corporation, made certain allocations of expenses between the taxpayers and their corporation, which eliminated the net operating loss for 1954 and its carryback to 1952 and 1953.[1] (R. 21-22, 28.)

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[1]Of course, the same allocation had the effect of reducing the corporate income for the year beginning August 1, 1954, and consequently its tax liability.

The taxpayers below attacked those allocations. The Court found, *inter alia,* that the taxpayers did not carry their burden of showing that they had overpaid their income taxes for the years in question and sustained the District Director's allocations as a proper and reasonable exercise of the discretion granted under Section 482 of the 1954 Internal Revenue Code because they were necessary to reflect income clearly between the taxpayers and their controlled corporation. (R. 20-24, 28-29.)

SUMMARY OF ARGUMENT

1. A tax refund suit involves a redetermination of a taxpayer's entire tax liability. Taxpayers must not only show that the Commissioner's assessment was wrong and that they do not owe the tax they seek to recover, but they must establish the facts from which their correct liability can be determined.

The taxpayers at bar have wholly failed to carry this burden of proof, for they introduced no evidence from which a correct determination of their liability could be computed. Since taxpayers had the opportunity below to prove their case, the United States should not be subjected to further proceedings because they failed to do so. The District Court properly dismissed taxpayers' complaint and the dismissal should be sustained.

2. Under 1954 Code Section 482, the Commissioner is authorized to allocate gross income, deductions, and other amounts between two or more taxpayers con-

trolled by the same interests if he determines that the allocation is necessary to prevent evasion of taxes or to reflect clearly the income of the taxpayers.

Subsequent to incurring expenses in growing their 1954 hop crop (deductible under their usual method of accounting) but before they harvested the crop, taxpayers transferred the crop and other farm assets to their newly-formed corporation solely in exchange for all of its stock. The income from the crop was reported by the corporation, and taxpayers, as a result of the expenses, reported a loss for 1954 which they attempted to set off against the income from their profitable 1952 and 1953 crops.

Under Section 482, the Commissioner allocated the deductions to taxpayers' controlled corporation, eliminating the distortion of income resulting from the reporting of a loss on a crop which they admitted was in fact profitable. The severance of their taxable year by incorporating their business when, due to the seasonal nature of the business, taxpayers had incurred expenses but had not yet received the resulting income prevented taxpayers' method of accounting from clearly reflecting income. The allocation effected a clear reflection of income by matching the expenses against the resulting revenue from the crop and prevented taxpayers from deducting and carrying back to prior years a purported loss for a year which was in fact profitable.

The issue involved here is identical to that presented in *Central Sugar Co. v. Commissioner,* 198 F. 2d 214, decided by the Court of Appeals for the Second Cir-

cuit. That case is indistinguishable from the one at bar, was correctly decided, and therefore should be followed. Other decisions, both of this Court and other Courts of Appeals, present analogous situations where the Commissioner's exercise of his authority under Section 482 in order to reflect income clearly was sustained. Those cases also involved the severance of the annual accounting period by some fundamental change in taxpayers' circumstances thus preventing a matching of expenses with the resulting income and causing a consequent distortion of income.

Moreover, Section 482 invests the Commissioner with special discretion with respect to the correct reflection of income, in addition to the presumptive correctness always attending his deficiency determination. To overturn the determination of whether income is clearly reflected, taxpayers must show that that determination is arbitrary and unreasonable. Taxpayers have not carried this burden.

ARGUMENT

I

THE TAXPAYERS DID NOT CARRY THEIR BURDEN OF SHOWING THEIR CORRECT TAX LIABILITY

This appeal arises from a suit against the United States for refund of income taxes.

A suit to recover a tax erroneously paid, although an action at law, is equitable in its function and is the lineal successor of the common law action of assumpsit for money had and received. The statutes authorizing

tax refunds and suits for their recovery are predicated upon the same equitable principles that underlie an action in assumpsit, and taxpayers' recovery of taxes is by virtue of a right measured by equitable standards. *Stone v. White,* 301 U.S. 532; *Champ Spring Co. v. United States,* 47 F. 2d 1 (C.A. 8th).

A suit for refund of overpaid taxes involves a redetermination of taxpayers' entire tax liability. *Lewis v. Reynolds,* 284 U.S. 281. The taxpayers must not only show that they do not owe the money they seek to recover, but they must establish the essential facts from which a correct determination of their liability can be made. *Helvering v. Taylor,* 293 U.S. 507; *Roybark v. United States,* 218 F. 2d 164 (C.A. 9th); *Maroosis v. Smyth,* 187 F. 2d 228 (C.A. 9th); *Decker v. Korth,* 219 F. 2d 732, 737 (C.A. 10th), certiorari denied, 350 U.S. 830; *United States v. Harris,* 216 F. 2d 690 (C.A. 5th); *United States v. Pfister,* 205 F. 2d 538, 541-542 (C.A. 8th).

In *Roybark* this Court upheld the dismissal of taxpayers' suit for refund of taxes where taxpayers offered no proof of the amount of their income and the cost of sales for the years in question, although the taxes were assessed and paid on a discarded theory of what was taxable income.

The case at bar, we submit, is virtually on all fours with *Roybark.* The taxpayers here, as the District Court found (R. 25-26), have not shown the amounts of their income and deductions for the years in question. Nor have they shown the total amount of taxes paid, assuming that sums in addition to the claimed

amount of $22,553.02 were paid for the years 1952-1954. Taxpayers did not introduce into evidence their income tax returns, their books of account, or the tax returns of their corporation, nor did they otherwise offer any evidence with respect to these crucial amounts. They also did not offer the Commissioner's notices of deficiency showing the reasons for the proposed deficiency assessments. On the basis of the record it is consequently impossible to make a correct determination of the amount of their tax liability, much less to determine the amount of the overpayment, and taxpayers therefore have failed to carry their burden of proof.

It is insufficient to point, as taxpayers do (Br. 27-28), to the fact that payment of $22,553.02 was made, for this does not establish the amounts of their income, deductions, and tax due, and without those amounts the amount of their tax liability is not known and no judgment for refund of overpaid taxes could have been awarded them even if they had prevailed on the merits of the assessments.[2] It is unnecessary to belabor the point that taxpayers had the opportunity below to prove the facts on which their recovery would be predicated had they prevailed, and that the United States, as any defendant, should not be subjected to further legal proceedings because taxpayer-plaintiffs either through inadvertence or design did not prove (or attempt to prove) those facts. We submit that the District Court was warranted in holding

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[2]The payment of $22,553.02 merely established the amount of the deficiencies assessed against taxpayers, and nothing more.

(R. 30) that taxpayers failed to carry their burden of proof and that it properly dismissed taxpayers' complaint.

II

THE ALLOCATION OF EXPENSES TO TAXPAYERS' WHOLLY-OWNED CORPORATION WAS NECESSARY TO REFLECT INCOME CLEARLY AND WAS PROPER UNDER 1954 CODE SECTION 482

Subsequent to incurring substantial expenses in growing their 1954 hop crop and shortly before the crop was harvested, the taxpayers transferred the crop and other farm assets to their newly-organized corporation solely in exchange for all of the corporation's stock. Until the transfer, which was effected as of July 31, 1954, the corporation had had no assets; the transferred assets, consisting mostly of the unharvested crop, were appraised at about $196,000 shortly before the corporation was organized. (R. 66.)

Taxpayers had entered into a contract for sale of the crop with S. S. Steiner, Inc., on January 22, 1954 (R. 58), and the income from the sale was reported by the corporation (R. 28). Since taxpayers apparently had little income for 1954, once their crop income was diverted to their corporation (R. 80), the expenses of raising the crop gave them, for tax purposes, a substantial loss for 1954 which they attempted to carry back and set off against their income from their profitable 1952 and 1953 crops (R. 27-28).

The Commissioner (through the District Director) allocated, under 1954 Code Section 482 (Appendix,

infra), the expenses deducted by taxpayers to their corporation.[3] As the District Court stated (R. 28), it is apparent that the allocation was made to reflect income clearly by matching income from the sale of the crops with the related expenses and thus avoid the artificial loss reported by taxpayers through the arbitrary severance of their annual accounting period.

Section 482 empowers the Secretary or his delegate to "distribute, apportion, or allocate gross income, deductions, credits, or allowances" between "two or more organizations, trades, or businesses (whether or not incorporated * * *) owned or controlled directly or indirectly by the same interests, * * * if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any such organizations, trades or businesses."

Section 39.45-1(a) of Treasury Regulations 118 (Appendix, *infra*), promulgated under 1939 Code Section 45, which corresponds to Section 482, defines "controlled taxpayer" as any one of two organizations (including a partnership or sole proprietorship) owned by the same interests. It also defines "true net income", in the case of a controlled taxpayer, as the net income which would have resulted to the controlled taxpayer had it dealt with the other members of the

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[3]The District Court found that taxpayers did not establish what the allocation was which they were attacking. (R. 28.) The failure to show the items and amounts allocated is part of the taxpayers' over-all failure to establish the correct amount of tax due and the amount of the overpayment. See Argument Point I, *supra*. Since the District Court assumes in its opinion (R. 20-24) that expenses were allocated, we shall make the same assumption.

group at arm's length. Subsection (b) provides that the purpose of the statute is to place a controlled taxpayer on tax parity with an uncontrolled taxpayer, by determining, according to the standard of an uncontrolled taxpayer, the true net income from the property and business of the controlled taxpayer. Subsection (c) provides, in part, that transactions between one controlled taxpayer and another will be subjected to special scrutiny to ascertain whether the common control is being used to reduce, avoid, or escape taxes. It also provides that the authority to determine true net income extends to any case in which either by inadvertence or design the taxable net income, in whole or in part, of a controlled taxpayer, is other than it would have been had the taxpayer in the conduct of his affairs been an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer.

Allocations to reflect clearly the income of a controlled taxpayer are thus authorized by the section which is not restricted to transactions that are motivated by tax avoidance considerations. *Dillard-Waltermire, Inc. v. Campbell,* 255 F. 2d 433 (C.A. 5th); *Central Cuba Sugar Co. v. Commissioner,* 198 F. 2d 214 (C.A. 2d), certiorari denied, 344 U.S. 874; *National Securities Corp. v. Commissioner,* 137 F. 2d 600 (C.A. 3d), certiorari denied, 320 U.S. 794; *Asiatic Petroleum Co. v. Commissioner,* 79 F. 2d 234 (C.A. 2d), certiorari denied, 296 U. S. 645.

Due to the fact that taxpayer's business was seasonal, the bulk of the year's expenses was incurred

during the beginning of the taxable year, while the resulting income was realized during the latter part of the year. By incorporating their business shortly prior to harvesting the crop, taxpayers severed the taxable year on the basis of which they had reported their farm business income. The distortion of income resulting from this severance is manifest when it is recognized that the taxpayers are seeking to deduct and carry back to prior years a loss from conducting a business for a portion of the year when, in fact, the business for the whole year was conducted at a profit.[4] Section 482, quite plainly, is designed to prevent such a distortion, and an allocation is, on the very face of things, necessary to reflect income clearly and properly.

As stated above, Section 39.45-1(b) of Treasury Regulations 118 (Appendix, *infra*) provides that the purpose of such a provision is to place commonly controlled taxpayers on a tax parity with uncontrolled taxpayers. A brief comparison of the effect of taxpayers' transfer of the crop to their wholly-owned corporation with that of an arm's length transaction demonstrates the necessity for the Commissioner's allocation. If taxpayers had sold their crop and other farms assets in an arm's length transaction, they would, at a minimum, have recovered the expenses as part of the purchase price, and hence would not have reported a loss for 1954. However, because the exchange of the crop and other

[4]Mr. Rooney testified (R. 65) that the 1954 crop was profitable; that is, the income realized from its sale exceeded his and the corporation's expenses.

assets for the stock of their corporation qualified under 1954 Code Section 351 (Appendix, *infra*), they reported no income on the exchange, but deducted the expenses incurred in raising the crop. The interruption of their normal accounting period by the transfer of the crop and other farm assets after the expenses had been incurred, but before the resulting income had been garnered, clearly placed taxpayers on a different footing for tax purposes than if they had dealt at arm's length with someone other than their wholly-owned corporation, and evinces the distortion of income resulting from the transfer to their corporation of the crop at that particular time of taxpayers' year.[5]

In *Central Cuba Sugar Co. v. Commissioner,* 198 F. 2d 214, certiorari denied, 344 U.S. 874, the Second Circuit decided the identical issue involved here. There the taxpayer-corporation incurred substantial expenses in raising a crop of sugar and, prior to the time that the crop was to be harvested, it transferred the crop and its business to a new corporation in a tax-free exchange for the new corporation's stock. As

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[5]If the transfer had occurred after taxpayers harvested the crop, they would have reported the income therefrom. Taxpayers' argument (Br. 11) that in an arm's length transaction the sale of the land and other assets would result in capital gains treatment is beside the point, for even in that event the expenses would be taken into account in computing gain. Moreover, it is at least doubtful whether taxpayers' argument rests upon a sound premise, for Section 1231(b)(4) of the 1954 Code authorizes capital gains treatment on the sale of an unharvested crop only when sold with the land; here there was no sale of the land (R. 63-64), since taxpayers only had a leasehold interest therein, which is not sufficient under the statute. Treasury Regulations (1954 Code) Section 1.1231-1(f).

in the case at bar, the new corporation reported all of the income from the sale of the crop, and the taxpayer attempted to carry back the loss resulting from deduction of the expenses to earlier taxable years. The Court of Appeals sustained the Commissioner's allocation of the expenses to the new corporation under 1939 Code Section 45, holding that the allocation was necessary to reflect income clearly. The court noted that an allocation under Section 45, which had its genesis in the consolidated return provisions, would dispel the fiction that a loss was sustained in the same manner that a consolidation would.

The court went on to state that (p. 216):

> The present statute was designed to deny the power to shift income or deductions arbitrarily among controlled corporations, and to place such corporations rather on a parity with uncontrolled concerns. U. S. Treas. Reg. 111, §29.45-1(b). In the case at bar, had the taxpayer sold its assets, including a crop of sugar about to be harvested, in an arm's-length transaction, the temporarily invested expenses would have been recouped as part of the purchase price. See U. S. Treas. Reg. 111, §29.45-1(a)(6). But in a sale for stock between related corporations, no such income is recorded and the accounts of the transferor cannot properly reflect the true income status of the enterprise as a going concern. Hence, to achieve "the rough matching of expenses and income previously attained," *United States v. Lynch*, 9 Cir., 192 F. 2d 718, 721, allocation of the expenses to the concern which is to profit by them is the only alternative.

Central Cuba Sugar, we submit, is on all fours with the instant case and should be followed. That it was correctly decided is not contested by taxpayers. They argue, however (Br. 8-11), that a division of a taxable year such as they effected with their controlled corporation should be permitted because it does not exempt income from tax but only postpones the tax. On this ground they attempt to distinguish *Central Cuba* (Br. 17-18), arguing that the deferral of tax there was subject to Section 45 because it would have resulted in the complete avoidance of tax, the successor taxpayer being a foreign corporation. The fallacy in taxpayers' argument is that the issue in *Central Cuba,* like that here, was whether there was a distortion of income, not whether income would permanently or temporarily escape tax.[6] The court's opinion deals solely with the question of whether income was clearly reflected, and does not even implicity make the fallacious assumption, as taxpayers do, that transactions which effect a postponement of tax are not subject to the reach of Section 482 regardless of whether income is clearly reflected.

Moreover, taxpayers' argument does violence to the basic concept of annual accounting periods, for by contending that allocation is not justified, though income is distorted in a particular year, where the lapse of an indefinite period of years may eliminate

[6]Nor does the statute discriminate between foreign and domestic corporations, allowing allocation in the case of the former, but not the latter.

the distortion, taxpayers ignore the fundamental principle that we are on an annual accounting period basis. Thus, it is no answer to state, as taxpayers do (Br. 9), that at some unspecified future time, which is the last year of the corporation's operations, the distortion of income presently being produced will be eliminated.

United States v. Lynch, 192 F. 2d 718 (C.A. 9th), cited by the court in *Central Cuba Sugar,* involved an analogous situation where the termination of the period in which income was normally earned also distorted income. There a corporation deducted during the course of its taxable year warehousing expenses and, like the taxpayers here, reported storage income only when goods were removed from storage and income was received, usually near the end of its taxable year. The corporation was liquidated shortly before the end of its taxable year—before it had received the storage income but after it had accrued the warehousing expenses. Under 1939 Code Section 41, which is similar to Section 482 to the extent that it empowers the Commissioner to require a method of accounting which will clearly reflect income, the Commissioner held that the storage charges should be accrued to the date of liquidation and reported as income. This Court sustained that determination and held (p. 721):

> Acceptance of the corporation's accounting method in prior years did not prevent the Commissioner from later exercising his statutory power within proper limits. The fundamental change in the corporation's circumstances, that

> is, its liquidation and consequent non-existence, prevented its accounting technique from achieving the rough matching of expenses and income previously attained.

Similarly, in the case at bar, the transfer of taxpayers' crop and farm assets and the resulting division of their annual accounting period was a fundamental change in their circumstances necessitating a departure from taxpayers' usual method of accounting and the exercise of the Commissioner's statutory power in making the allocation to match income and expenses.

In *Dillard-Waltermire, Inc. v. Campbell*, 255 F. 2d 433 (C.A. 5th), the taxpayer-corporation sold oil drilling rigs for their book value and certain uncompleted drilling contracts at cost to a partnership consisting of the taxpayer's stockholders. The taxpayer, on the completed contract method of accounting, reported no income from the contracts which were more than half completed. *Dillard-Waltermire* is similar to the case at bar in that the sale of the contracts and assets of the corporate taxpayer took place prior to the time that its prior efforts could result in the fruition of income under its regular method of accounting. There, under Section 45, the correct reflection of income was achieved by allocating to the taxpayer a portion of the income actually realized by the successor partnership. Here the Commissioner did not go so far as to allocate income to the taxpayers, but rather determined that their expenses should be allocated to their controlled corporation—those expenses having bene-

fited the corporation by enabling it to realize income which they would have realized had they not transferred their business at this particular time of the year. See also *Standard Paving Co. v. Commissioner,* 190 F. 2d 330 (C.A. 10th), and *Jud Plumbing & Heating Co. v. Commissioner,* 153 F. 2d 681 (C.A. 5th).

In addition to the presumptive correctness which always attends the Commissioner's deficiency determination, his determination concerning the correct reflection of income under Section 482 represents the exercise of a special discretion vested in him by Congress. To overturn his determination of what is a clear reflection of income, the taxpayer must affirmatively demonstrate that that discretion had been abused—that the determination is arbitrary and unreasonable. *Aiken Drive-In Theatre Corp. v. United States,* 281 F. 2d 7 (C.A. 4th); *G. U. R. Co. v. Commissioner,* 117 F. 2d 187, 189; *National Securities Corp. v. Commissioner, supra.* As we have pointed out above, the Commissioner's determination that income was not clearly reflected is amply supported by taxpayers' reporting a loss on a profitable crop and by the decision in *Central Cuba Sugar Co. v. Commissioner, supra.* Taxpayers have not shown that the Commissioner abused his discretion and, in fact, they do not contest the fact that there was a distortion of income. Rather, they argue (Br. 8-12) that the Commissioner's allocation also does not clearly reflect income because the allocation gives their corporation two years' deductions in one year. Even if it is as-

sumed that the allocation does produce this result,[7] taxpayers have not established that the Commissioner's allocation was arbitrary. Although the allocation may not effect a theoretically perfect reflection of income, taxpayers, to upset that allocation, must show that income is more clearly reflected without the allocation than with it; and they have not done so. Furthermore, taxpayers can hardly complain of an allocation which, in giving their controlled corporation two years' deductions in one year, is beneficial to that corporation.

Section 482 applies to any commonly controlled organizations, whether or not incorporated, and thus is as applicable to individual taxpayers and their wholly-owned corporation as it was to the two related corporations in *Central Cuba Sugar*. See Section 39.45(a)-1(a) of Treasury Regulations 118. The taxpayers here, however, argue (Br. 25-27) that since "It is required that the control exist during the entire period in which the allocated item accrues", the control required by Section 482 is missing—their corporation having become a viable entity only as of July 31, 1954. Taxpayers did not raise and rely on this issue below and hence are not entitled to raise it on appeal. Nevertheless their argument, for which they cite no authority, is without merit.

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[7]The only evidence introduced with respect to the corporation's accounting method and period was that it was on a July 31 fiscal year. (R. 61.) Its tax returns were not introduced; neither was any other evidence offered to establish its method of accounting, whether the Commissioner had made any adjustments in its method or period of reporting income, or of the effect of the allocation on its taxable income. Taxpayers' conclusion is therefore not supported by the record.

Taxpayers' unsupported premise completely misinterprets the reach and purpose of the statute. Control or ownership must exist when the taxpayers deal with each other. As the legislative history indicates, the predecessor of Section 482 was designed to prevent the avoidance of tax or the distortion of income by the shifting of profits from one business to another. H. Rep. No. 2, 70th Cong., 1st Sess., p. 146 (1939-1 Cum. Bull. (Part 2) 384, 395); S. Rep. No. 960, 70th Cong., 1st Sess., p. 24 (1939-1 Cum. Bull. (Part 2) 409, 426). See *Asiatic Petroleum Co. v. Commissioner, supra,* pp. 236-237. This purpose is effected if the taxpayers are commonly controlled when they deal with each other; control at another time is unimportant. Section 39.45-1(c) of Treasury Regulations 118 (Appendix, *infra*) supports this view in stating that *transactions* between controlled taxpayers will be subject to special scrutiny. Taxpayers' interpretation of "control" emasculates Section 482, for any transaction with a newly formed taxpayer would avoid its application; it is difficult to believe that a statute so broadly framed as Section 482 was intended to be so easily circumvented. Taxpayers owned and controlled the corporation from the first moment of its existence (R. 86-88) and they cannot avoid the Section's application by arguing lack of control at an irrelevant point of time.

Taxpayers contend (Br. 11-14) that the allocation does not put them in the same position that they would have been in had they been dealing at arm's length. It is somewhat difficult to understand this

argument, for as taxpayers point out (Br. 11), in dealing at arm's length they would not have been able to claim the deductions here at issue—which is the very result sought to be achieved by the allocation—and would not have reported an artificial loss on the profitable 1954 crop.

To support this argument, taxpayers rely (Br. 12) on *Simon J. Murphy Co. v. Commissioner,* 231 F. 2d 639 (C.A. 6th). The court in *Murphy* distinguished that case from the situation involved in *Central Cuba Sugar* (and also in this case). In any event, the Fifth Circuit in *Tennessee Life Insurance Co. v. Phinney,* 280 F. 2d 38, reached an opposite result with respect to the same issue involved in *Murphy,* and we agree with the Fifth Circuit's view that *Murphy* was incorrectly decided due to the Sixth Circuit's failure to uphold the Commissioner's determination that an allocation under Section 45 was necessary to reflect income clearly where altered circumstances (a corporate dissolution) caused a distortion of income under the taxpayer's usual accounting method.[8]

Taxpayers urge (Br. 21-25) that allocating the expenses has the practical result of requiring them to inventory unharvested crops, which is not a permissible method of accounting; they claim that this demonstrates that the allocation is improper and arbitrary. Without reaching the question of whether they are in effect inventorying such crops, it is settled law that

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[8]*Diamond A. Cattle Co. v. Commissioner,* 233 F. 2d 739 (C.A. 10th), also cited by taxpayers (Br. 15-16), does not involve an application of the Commissioner's special discretion under Section 482 or Section 45 and hence is inapposite.

the application of Section 482 is not barred because it conflicts with other provisions of the Code. As the Court of Appeals for the Third Circuit aptly said in *National Securities Corp. v. Commissioner,* 137 F. 2d 600, 602:

> Section 45 [now section 482] is directed to the correction of particular situations in which the strict application of the other provisions of the act will result in a distortion of the income of affiliated organizations. In every case in which the section is applied its application will necessarily result in an apparent conflict with the literal requirements of some other provision of the act. If this were not so Section 45 would be wholly superfluous. We accordingly conclude that the application of Section 45 may not be denied because it appears to run afoul of the literal provisions * * * [of the Internal Revenue Code] if the Commissioner's action in allocating under the provisions of Section 45 the loss involved in this case was a proper exercise of the discretion conferred upon him by the section.

See *Aiken Drive-In Theatre Corp. v. United States,* 281 F. 2d 7 (C.A. 4th); *Advance Machinery Exch. v. Commissioner,* 196 F. 2d 1006, 1009 (C.A. 2d). And their argument (Br. 12) that the application of Section 482 denies them the right to avail themselves of the loss carry-back provisions of the Code neglects the central issue here—whether claiming a loss of 1954 clearly reflects income.

In sum, the allocation was necessary to reflect income clearly, and was within the Commissioner's discretion under Section 482; moreover, the taxpayers

have not shown it to be arbitrary and unreasonable, nor have they shown why *Central Cuba Sugar Co. v. Commissioner, supra,* should not be followed.

CONCLUSION

For the reasons stated above, the judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

LOUIS F. OBERDORFER,
Assistant Attorney General.
MEYER ROTHWACKS,
MYRON C. BAUM,
HAROLD M. SEIDEL,
Attorneys, Department of Justice,
Washington 25, D. C.

CECIL F. POOLE,
United States Attorney.
RICHARD L. CARICO,
Assistant United States Attorney.

August, 1961.

(Appendix Follows.)

Appendix.

Appendix

Internal Revenue Code of 1954:

Sec. 351. Transfer to Corporation Controlled by Transferor.

(a) *General Rule.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation and immediately after the exchange such person or persons are in control (as defined in section 368(c)) of the corporation. For purposes of this section, stock or securities issued for services shall not be considered as issued in return for property.

* * * * * * *

(26 U.S.C. 1958 ed., Sec. 351.)

Sec. 482. Allocation of Income and Deductions Among Taxpayers.

In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary or his delegate may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses.

(26 U.S.C. 1958 ed., Sec. 482.)

Treasury Regulations 118 (1939 Code):

Sec. 39.45-1 *Determination of the taxable net income of a controlled taxpayer*—(a) *Definitions.* When used in this section:

(1) The term "organization" includes any organization of any kind, whether it be a sole proprietorship, a partnership, a trust, an estate, or a corporation (as each is defined or understood in the Internal Revenue Code or the regulations in this part), irrespective of the place where organized, where operated, or where its trade or business is conducted, and regardless of whether domestic or foreign, whether exempt, whether affiliated, or whether a party to a consolidated return.

(2) The terms "trade" or "business" include any trade or business activity of any kind, regardless of whether or where organized, whether owned individually or otherwise, and regardless of the place where carried on.

(3) The term "controlled" includes any kind of control, direct or indirect, whether legally enforceable, and however exercisable or exercised. It is the reality of the control which is decisive, not its form or the mode of its exercise. A presumption of control arises if income or deductions have been arbitrarily shifted.

(4) The term "controlled taxpayer" means any one of two or more organizations, trades, or businesses owned or controlled directly or indirectly by the same interests.

(5) The terms "group" and "group of controlled taxpayers" mean the organizations, trades, or businesses owned or controlled by the same interests.

(6) The term "true net income" means, in the case of a controlled taxpayer, the net income (or, as the case may be, any item or element affecting net income) which would have resulted to the controlled taxpayer, had it in the conduct of its affairs (or, as the case may be, in the particular contract, transaction, arrangement, or other act) dealt with the other member or members of the group at arm's length. It does not mean the income, the deductions, the credits, the allowances, or the item or element of income, deductions, credits, or allowances, resulting to the controlled taxpayer by reason of the particular contract, transaction, or arrangement, the controlled taxpayer, or the interests controlling it, chose to make (even though such contract, transaction, or arrangement be legally binding upon the parties thereto).

(b) *Scope and purpose.* (1) the purpose of section 45 is to place a controlled taxpayer on a tax parity with an uncontrolled taxpayer, by determining, according to the standard of an uncontrolled taxpayer, the true net income from the property and business of a controlled taxpayer. The interests controlling a group of controlled taxpayers are assumed to have complete power to cause each controlled taxpayer so to conduct its affairs that its transactions and accounting records truly reflect the net income from the property and business of each of the controlled taxpayers. If, however, this has not been done, and the taxable net incomes are thereby understated, the statute contemplates that the Commissioner shall intervene, and, by making such distributions, apportionments, or allocations as he may deem necessary of gross income,

deductions, credits, or allowances, or of any item or element affecting net income, between or among the controlled taxpayers constituting the group, shall determine the true net income of each controlled taxpayer. The standard to be applied in every case is that of an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer.

* * * * * * *

(c) *Application.* Transactions between one controlled taxpayer and another will be subjected to special scrutiny to ascertain whether the common control is being used to reduce, avoid, or escape taxes. In determining the true net income of a controlled taxpayer, the Commissioner is not restricted to the case of improper accounting, to the case of a fraudulent, colorable, or sham transaction, or to the case of a device designed to reduce or avoid tax by shifting or distorting income, deductions, credits, or allowances. The authority to determine true net income extends to any case in which either by inadvertence or design the taxable net income, in whole or in part, of a controlled taxpayer, is other than it would have been had the taxpayer in the conduct of his affairs been an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer.

No. 17,313

IN THE

United States Court of Appeals

For the Ninth Circuit

FRANCIS L. ROONEY and IRENE ROONEY, his wife,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF FOR APPELLANTS FRANCIS L. ROONEY AND IRENE ROONEY

N. RICHARD SMITH,
HOWARD & PRIM,
111 Sutter Street,
San Francisco 4, California,
Attorneys for Appellants.

Subject Index

Table of Authorities Cited

No. 17,313

IN THE

United States Court of Appeals

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REPLY BRIEF FOR APPELLANTS FRANCIS L. ROONEY AND IRENE ROONEY

PRELIMINARY STATEMENT

This brief is directed principally to the Government's argument on a purported issue as to burden of proof. For appellants' position on the only issue of substance in this case, we respectfully refer the Court's attention to our opening brief.

ARGUMENT

I.

APPELLANTS HAVE ESTABLISHED WITH EXACTITUDE THE SPECIFIC RECOVERY TO WHICH THEY ARE ENTITLED

In an effort to obfuscate the critical issue in this case, the Government devotes its initial argument (Br.

6-9) to a completely baseless hypothesis, namely, that the record does not disclose the exact sum of money which the Government has wrongfully exacted and now holds.

The mechanics of the establishment and collection of this deficiency have been described in the briefs of both parties. To repeat, the District Court's opinion states that the Commissioner, by allocating the expenses incurred by appellants in connection with the crop subsequently transferred to their corporation, denied them individually a deduction for those expenses (R. 20-21). The basis for this allocation was an audit of taxpayers' returns for the years in question. The audit involved an evaluation of all income and expenses reported by appellants during the period examined. The sole challenge to the correctness of those returns related to the crop expenses. Since income, as reported by appellants, was not questioned, a simple recomputation of their individual tax liability was made after the expense items were eliminated.

Appellants paid the additional tax as computed by the Government, filed claims for refund and, upon their disallowance, commenced this action in timely fashion. As is universally the case, the filing of the claim for refund led to a second audit by the Government of the entire returns of appellants and, again, the sole question was whether appellants individually were entitled to deduct these expenses.

Neither the propriety of deducting these expenses as ordinarily and necessarily incurred in the carrying on of a trade or business nor their exact amount has

been in dispute at any stage of the administrative or judicial proceedings. Appellants' complaint (R. 4) alleged both the precise amounts that the District Director of Internal Revenue proposed as deficiencies and the payment of those amounts together with statutory interest. These allegations were admitted in the Government's answer (R. 18).

Ignoring the clarity of the record, the Government indulges itself in the sophistical contention that appellants have, in some inexplicable fashion, failed to prove the sum they are entitled to recover. Attempting to buttress this assertion, the Government cites numerous authorities, none of which are even remotely apposite to the facts of the instant case.* Placing principal reliance upon *Roybark v. United States* (9th Cir. 1954), 218 F.2d 164, the Government finds it "virtually on all fours" with the case at bar. Yet a cursory examination of the facts of that case reveals their fundamental difference from the situation here. In *Roybark,* because of the inadequacies of the taxpayer's records, the Commissioner had to *estimate* a deficiency. Although holding for the taxpayer on the merits, this Court refused to conjecture as to the correct tax liability. The Government's computation had always been in dispute and taxpayer had failed to

*Appellants have no quarrel with the cases of *Stone v. White* (1937), 301 U.S. 532, and *Champ Spring Co. v. United States* (8th Cir. 1931), 47 F.2d 1, neither of which involved the taxpayer's burden of proof in a refund action. These cases require a taxpayer's refund action to be consonant with equitable principles, which this suit doubtless is, assuming the Commissioner has wrongfully invoked Section 482.

sustain his burden of proving the amount wrongfully withheld.

There has never been any similar dispute as to computation in the instant case. No estimate ever was or is necessary. It would have been surplusage for appellants to introduce into evidence their income tax returns, books of accounts or tax returns of their successor corporation in light of the lack of any issue either on the computation of the deficiency or on the fact that the only additional tax liability, after two audits by the Government, hinges on this specific disallowance of expenses.

Maroosis v. Smyth (9th Cir. 1951), 187 F.2d 228 and *Decker v. Korth* (10th Cir. 1955), 219 F.2d 732, also involved estimates by the Commissioner as to the amount of a deficiency. Both cases held that taxpayers must not only prove the Commissioner's computation to be incorrect but also must establish by their own evidence the correct amount of the tax liability. As stated in *Helvering v. Taylor* (1934), 293 U.S. 507, a refund action imposes upon the taxpayer the burden of proving with exactitude the amount of his overpayment; where a deficiency results from the Commissioner's estimate, necessitated by the inadequacies or insufficiencies of the taxpayers' own records, then the error of that estimate must be proved. But there has been no conjecture as to the deficiency here. Both appellants and the Government agree on the mathematical accuracy of the latter's computation.

In connection with *Helvering v. Taylor,* it is interesting to note that the Supreme Court rejected the

notion that a taxpayer could, merely because he failed to show the exact amount of tax he might owe, be required to pay a tax deficiency resulting from an improper exercise of the Commissioner's authority. In that case the taxpayer's position on the merits was upheld and his failure of proof, again resulting from failure to show the error in a speculative computation by the Commissioner, resulted in the matter being remanded to establish the amount of the refund owing.

In *Lewis v. Reynolds* (1932), 284 U.S. 281, the Court simply held that the Government's audit in connection with a claim for refund properly encompasses a redetermination of the taxpayer's entire tax liability. As shown above, the refund audit of appellants' returns here resulted in no assessment of liability other than that in issue in this case. *U. S. v. Harris* (5th Cir. 1954), 216 F.2d 690, involved a failure by the taxpayer to establish either the fact or the amount of payments which would have constituted allowable deductions. *United States v. Pfister* (8th Cir. 1953), 205 F.2d 538, involved a speculative assessment by the Commissioner where the taxpayer had failed to maintain adequate records from which the precise amount of the tax liability could be ascertained.

An analysis of all of these cases leads inescapably to the conclusion that there is no authority for the proposition that these appellants have failed to sustain any supposed burden of proving the amount of money which they are entitled to recover. Conclusion of law 5 (R. 40) that "Plaintiffs failed to sustain

the burden of proof'' is ambiguous in that it cannot be determined whether this conclusion adverts to the merits of the cause or the amount of money in issue. In either respect, it is clearly erroneous.

Nor is there any merit in the Government's adroit, if inaccurate, statement that the District Court so held and ''that it properly dismissed taxpayers' complaint'' (Br. 9). The District Court obviously rendered its decision on the merits, and its opinion does not even comment on this argument of the Government.

II.

THE COMMISSIONER'S ALLOCATION IS NOT SUSTAINED BY PERTINENT AUTHORITY

The cases cited by appellee relevant to the issue at bar have been fully discussed in appellants' opening brief, with the exception of *Tennessee Life Insurance Company v. Phinney* (5th Cir. 1960), 280 F.2d 38. The facts of that case closely parallel those of *Simon J. Murphy v. Commissioner of Internal Revenue* (6th Cir. 1956), 231 F.2d 639. In its reluctant refusal to follow the holding of the *Murphy* case, the majority opinion rested in large measure on two cases from the Fifth Circuit holding that the obligation for ad valorem taxes had not ''accrued'' prior to the date of the distribution in liquidation and, accordingly, it was not at that date fully deductible by the transferor. This rationale is obviously inapplicable to the instant case as the expenses here allocated had

actually been paid by the appellants. It should be noted that, in spite of the authorities which the majority felt impelled to follow, Circuit Judge Cameron dissented on the ground that the holding of the *Murphy* case should be followed.

Since the filing of appellants' opening brief, the Tax Court has rendered its decision in *South Lake Farms, Inc. v. Commissioner of Internal Revenue* (1961), 36 T.C. No. 106 which involved facts similar to this case. The Tax Court rejected the Commissioner's attempt to attribute income from the sale of unharvested crops realized by a transferee in liquidation to the transferor. In its first ground of decision, the Court followed *Elsie SoRelle* (1954), 22 T.C. 459 which also rejected an attempt by the Commissioner to treat the income from the sale of unharvested crops in the hands of certain donees as the income of their donor.

The relevance of the holding in the *South Lake Farms* case is that the income from sale of unharvested crops can be properly realized by the transferee, even though the expenses of producing those crops have been borne by the transferor. The Court ruled that unfavorability to the Government of the immediate tax effects does not justify the Commissioner in ignoring the history of the transaction.

CONCLUSION

For the foregoing reasons, together with the authority cited in appellants' opening brief, the decision of the District Court is in error and should be reversed.

Dated, San Francisco, California,
October 2, 1961.

Respectfully submitted,
N. Richard Smith,
Howard & Prim,
Attorneys for Appellants.

No. 17313

United States
Court of Appeals
for the Ninth Circuit

FRANCIS L. ROONEY, and IRENE ROONEY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Northern Division.

Phillips & Van Orden Co., 4th & Berry, S. F., Calif.—Rec. 4/20/61—Printed 4/25/61

No. 17313

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Defendant and Appellee.

In the United States District Court for the Northern District of California, Northern Division

No. 7819

FRANCIS L. ROONEY and IRENE ROONEY, His Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT UNDER THE INTERNAL REVENUE CODE

Plaintiffs above named complain of Defendant, and for a cause of action allege as follows:

I.

This action is brought under Section 7422 of the United States Internal Revenue Code of 1954, and Section 1346 (a) of Title 28, USCA, as amended, and it is a claim against the defendant for recovery of federal income taxes assessed against and collected from plaintiffs pursuant to said United States Internal Revenue Code.

II.

The plaintiffs, Francis L. Rooney and Irene Rooney, were at all times mentioned herein, and now are, husband and wife, and are citizens of the United States of America, residing in the County of Sacramento, State of California.

III.

The income tax returns of plaintiffs involved in this proceeding are for the calendar years 1952, 1953 and 1954.

IV.

On or about the 18th day of October, 1956, the District Director of Internal Revenue at Sacramento, California, proposed deficiencies in income tax of the plaintiffs for the years involved here as follows:

Year 1952	$ 1,966.26
Year 1953	19,700.28
Year 1954	886.48
Total	$22,553.02

V.

On November 20, 1956, plaintiffs paid to the District Director of Internal Revenue at San Francisco, California, the deficiencies in federal income tax proposed for the years 1952 to 1954, inclusive, as hereinabove set forth, together with statutory interest thereon to the date of payment.

VI.

On January 28, 1957, plaintiffs, in accordance with the provisions of Section 7422 (a) of the Internal Revenue Code of 1954 filed Claims for Refund of the amounts paid to the District Director of Internal Revenue at San Francisco, referred to in the immediately preceding paragraph of this Complaint, to which said Claim for Refund was at-

tached a statement setting forth the basis upon which the plaintiffs contend the same is due them. Copies of Claims for Refund aforesaid are attached to this Complaint as Exhibit A.

VII.

Under date of June 9, 1958, the District Director of Internal Revenue at San Francisco, California, addressed to the taxpayers by Registered Mail, in accordance with the provisions of Section 6532 (a) (1) of the Internal Revenue Code, his Notice of Disallowance in full of the Claims for Refund hereinabove referred to. Copies of said Notices of Disallowance are attached hereto as Exhibits B-1, B-2 and B-3.

VIII.

That for the reasons set forth in statements attached to said Claims for Refund, attached hereto as Exhibit A, said taxes were illegally and erroneously collected from the Plaintiffs and ought, accordingly, to be refunded to them by the Defendant, together with interest thereon as provided by law.

IX.

That by reason of the aforesaid there is now due and owing to the Plaintiffs herein the sum of $22,553.02, plus interest thereon from the date of payment alleged in Paragraph V of this Complaint, as provided by law.

Wherefore, Plaintiffs pray judgment in their favor in the sum of $22,553.02, together with in-

terest thereon as provided by law, for their costs of suit, and for such other and further relief as this Court may deem proper in the circumstances.

HOWARD & PRIM,

By /s/ HENRY W. HOWARD,
Attorneys for Plaintiff.

EXHIBIT A

U. S. Treasury Department
Internal Revenue Service

CLAIM

To Be Filed With the District Director Where Assessment Was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required.

☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

Name of taxpayer or purchaser of stamps: Francis L. Rooney and Irene Rooney, his wife.

Number and street: c/o Henry W. Howard, Attorney at Law, 111 Sutter St., San Francisco 4, Calif.

1. District in which return (if any) was filed: Sacramento, California.

2. Name and address shown on return, if different from above: 633-46th Street, Sacramento, California.

3. Period From January 1, 1952, to December 31, 1952.

4. Kind of tax: Income Tax.

5. Amount of assessment: $1,966.26.

Date of payment: March 15, 1953.

6. Date stamps were purchased from the Government:

7. Amount to be refunded: $1,966.26.

8. Amount to be abated (not applicable to income, estate, or gift taxes):

9. The claimant believes that this claim should be allowed for the following reasons: See statement attached.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signed .....

Dated ....., 19.... .....

Instructions

1. The claim must set forth in detail each ground upon which it is made and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. If a joint income tax return was filed for the year for which this claim is filed, both husband and wife must sign this claim even though only one had income.

3. Whenever it is necessary to have the claim executed by an agent on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent to sign the claim on behalf of the taxpayer shall accompany the claim.

4. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

5. Where the taxpayer is a corporation, the claim will be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

U. S. Treasury Department
Internal Revenue Service

CLAIM
To Be Filed With the District Director Where Assessment Was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required.

☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

Name of taxpayer or purchaser of stamps: Francis L. Rooney and Irene Rooney, his wife.

Number and street: c/o Henry W. Howard, Attorney at Law, 111 Sutter St., San Francisco 4, Calif.

1. District in which return (if any) was filed: Sacramento, California.

2. Name and address shown on return, if different from above: 633-46th Street, Sacramento, California.

3. Period From January 1, 1953, to December 31, 1953.

4. Kind of tax: Income Tax.

5. Amount of assessment: $19,700.28.

Date of payment: March 15, 1954.

6. Date stamps were purchased from the Government:

7. Amount to be refunded: $19,700.28.

8. Amount to be abated (not applicable to income, estate, or gift taxes:

9. The claimant believes that this claim should be allowed for the following reasons: See Statement Attached.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signed .....

.....

Dated....., 19....

Instructions

1. The claim must set forth in detail each ground upon which it is made and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. If a joint income tax return was filed for the year for which this claim is filed, both husband and wife must sign this claim even though only one had income.

3. Whenever it is necessary to have the claim executed by an agent on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent to sign the claim on behalf of the taxpayer shall accompany the claim.

4. If a return is filed by an individual and a refund claim is thereafter filed by a legal repre-

sentative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

5. Where the taxpayer is a corporation, the claim will be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

U. S. Treasury Department
Internal Revenue Service

CLAIM
To Be Filed With the District Director Where Assessment Was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required.

☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

Name of taxpayer or purchaser of stamps: Francis L. Rooney and Irene Rooney, his wife.

Number and street: c/o Henry W. Howard, Attorney at Law, 111 Sutter St., San Francisco 4, Calif.

1. District in which return (if any) was filed: Sacramento, California.

2. Name and address shown on return, if different from above: 633-46th Street, Sacramento, California.

3. Period—From January 1, 1954, to December 31, 1954.

4. Kind of tax: Income Tax.

5. Amount of assessment: $886.48.

Dates of payment: March 15, 1955.

6. Date stamps were purchased from the Government:

7. Amount to be refunded: $886.48.

8. Amount to be abated (not applicable to income, estate, or gift taxes):

9. The claimant believes that this claim should be allowed for the following reasons: See Statement Attached.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the

best of my knowledge and belief is true and correct.

Signed .....

.....

Dated....., 19....

Instructions

1. The claim must set forth in detail each ground upon which it is made and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. If a joint income tax return was filed for the year for which this claim is filed, both husband and wife must sign this claim even though only one had income.

3. Whenever it is necessary to have the claim executed by an agent on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent to sign the claim on behalf of the taxpayer shall accompany the claim.

4. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same

fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

5. Where the taxpayer is a corporation, the claim will be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

Statement Made in Claims for Refund

The taxpayers sustainded a net operating loss from farming operations for the short fiscal period January 1, 1954, to July 31, 1954. In accordance with Section 122 of the Internal Revenue Code of 1939, taxpayers carried back said operating loss to the years 1952 and 1953, and claimed a refund on payments made upon Declarations of Estimated Tax for the year 1954. On audit of the tentative carryback adjustment claims filed with respect to said years, the Commissioner reallocated the operating loss in question in substantial part to a successor corporation known as F. L. Rooney, Inc., upon the alleged authority of Section 45 of the Internal Revenue Code of 1939. The deficiencies in income tax resulting from said reallocation of expense, together with statutory interest, were paid by the taxpayers to the District Director of Internal Revenue at Sacramento, California, on November 28, 1956. Said amounts, exclusive of interest, are as follows:

Year	Deficiency in Tax
1952	$ 1,966.26
1953	19,700.28
1954	886.48
Total	$22,553.02

The taxpayers contend that Section 45 of the Internal Revenue Code of 1939 has no application to the facts of this case, and that accordingly the Commissioner of Internal Revenue was without authority to reallocate income and expense between the taxpayers and F. L. Rooney, Inc., for the fiscal periods in question.

EXHIBIT B-1

U. S. Treasury Department
Internal Revenue Service
District Director
San Francisco 2, Calif.

June 9, 1958.

In reply refer to: Code 1110—FL.-227.

Francis L. & Irene Rooney,
c/o Henry W. Howard, Attorney at Law,
111 Sutter St.,
San Francisco, Calif.

Amount Claimed: $886.48
Period: 1954

In accordance with the provisions of Section 6532(a) (1) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By Direction of the Commissioner.

Very truly yours,

/s/ JOSEPH M. CULLEN,
District Director.

FL-227

EXHIBIT B-2

U. S. Treasury Department
Internal Revenue Service
District Director
San Francisco 2, Calif.

June 9, 1958.

In reply refer to: Code 1110—FL-227.

Francis L. Rooney & Irene Rooney,
c/o Henry W. Howard, Attorney at Law,
111 Sutter St.,
San Francisco 4, Calif.

Amount Claimed: $19,700.28
Period: 1953

In accordance with the provisions of Section 6532(a) (1) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By Direction of the Commissioner.

Very truly yours,

/s/ JOSEPH M. CULLEN,
District Director.

FL-227

EXHIBIT B-3

U. S. Treasury Department
Internal Revenue Service
District Director
San Francisco 2, Calif.

June 9, 1958.

In reply refer to: Code 1110—FL-227.

Francis L. & Irene Rooney,
633 46th St.,
Sacramento, Calif.

Amount Claimed: $1966.26
Period: 1952

In accordance with the provisions of Section 6532(a) (1) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By Direction of the Commissioner.

Very truly yours,

/s/ JOSEPH M. CULLEN,
District Director.

FL-227

[Endorsed]: Filed October 17, 1958.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant, the United States of America, by and through its attorney, Robert H. Schnacke, United States Attorney in and for the Northern District of California, and for answer to plaintiffs' complaint admits, denies, and alleges as follows:

I.

Admits the allegations contained in Paragraph I of the complaint.

II.

Admits the allegations contained in Paragraph II of the complaint.

III.

Admits the allegations contained in Paragraph III of the complaint.

IV.

Admits the allegations contained in Paragraph IV of the complaint and alleges that plaintiffs were assessed the taxes therein on January 15, 1957.

V.

Admits the allegations contained in Paragraph V of the complaint except alleges that plaintiffs' payment to the District Director was made on November 30, 1956.

VI.

Admits the allegations in the first sentence of Paragraph VI of the complaint; admits that what

purport to be plaintiffs' claims for refund are attached to the complaint, but denies that plaintiffs have a right to recover under any of the reasons in said claims for refund, and denies any and all substantive statements contained in said claims for refund unless specifically admitted herein.

VII.

Admits the allegations in Paragraph VII of the complaint.

VIII.

Denies the allegations contained in Paragraph VIII of the complaint.

IX.

Denies the allegations contained in Paragraph IX of the complaint.

Wherefore defendant demands dismissal of plaintiffs' complaint, judgment in its favor, the costs of this action, and any other relief this Court may deem just and proper.

ROBERT H. SCHNACKE,
United States Attorney;

By /s/ LYNN J. GILLARD,
Assistant U. S. Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed January 5, 1959.

[Title of District Court and Cause.]

CORRECTED MEMORANDUM AND ORDER

Plaintiffs have brought this action to recover money paid to defendant as the result of a Federal income tax assessment, which plaintiffs contend was erroneously levied against them. Jurisdiction is founded upon Title 26 U.S.C. § 7422, I.R.C. (1954) § 7422, and Title 28 U.S.C. § 1346. The case has been tried by the Court, sitting without a jury. The relevant facts are simple and are not in substantial dispute.

Plaintiffs are hop farmers. They raised crops and sold them at a profit in 1952 and 1953. They raised a good crop in 1954. They transferred this latter crop, together with the other assets of their farm, to F. L. Rooney, Inc., as of July 31, 1954, in exchange for all the stock of that corporation. Plaintiffs reported the expenses of raising the crop, up until July 31, 1954, on their return as individuals. They did not report the stock of the wholly owned corporation as being of any value. They thus claimed a loss for 1954, and carried it back to 1952 and 1953, in their returns as individuals. They reported the gross profit from sale of the crop as income to the corporation, without reporting any of the expenses of raising the crop prior to July 31, 1954. The District Director of Internal Revenue, in order to reflect clearly the income of plaintiffs and the corpo-

ration, reallocated the expenses of growing the crop to the corporation (I.R.C. (1939) § 45).

The transfer as of July 31, 1954, was not an incident requiring or justifying the realization of gain, or loss, for Federal income tax purposes under the provisions of the law in force at that time (I.R.C. (1939) § 112(b)(5)). It is plaintiffs' contention that their return was justified by this fact, and that the Director had no authority to invoke § 45 of the 1939 Internal Revenue Code in such a way as to nullify § 112 of that Code.

In order to handle the transfer of property in question in such a way as to recognize neither gain nor loss from the transfer, as required by § 112, supra, plaintiffs should have transferred the property at a cost valuation. The method which plaintiffs actually chose recognized a loss; and, moreover, it recognized a loss that did not, in reality, exist. The action of the Director under § 45, therefore, effectuated the purpose of § 112, rather than nullifying this latter section. To have been technically correct, plaintiffs should have reported the costs of growing the crop as their expenses, and reported the gross income from the sale of the crop by setting the value of the stock of the corporation equal to the cost basis of the assets transferred in exchange for the stock. If plaintiffs had followed this procedure, the tax result would have been the same as that obtained by reason of the action which was taken by the District Director. Plaintiffs would have reported neither a net gain, nor a net loss,

from their growing and disposition of the crop. The corporation could have offset the cost of growing the crop against the profit derived from its sale.

The Director's action did not nullify or tend to nullify § 112, supra. Actually it achieved a matching of income and expenses incurred to earn that income. It, therefore, was well calculated to achieve the purpose of § 45, supra, to reflect clearly the income of plaintiffs (See: United States vs. Lynch, 192 F. 2d 718). The action of the Director was not in excess of his authority.

This case is closely parallel to Central Cuba Sugar Co. vs. Commissioner, 198 F. 2d 214, in which the taxpayer transferred all its assets to a successor corporation after the expenses of raising a sugar crop had been incurred, and just before the crop was to be harvested. The Commissioner was held to have the power (and to have exercised it properly) to allocate the expenses to the successor corporation, although there was no tax avoidance motive for the transfer, and the timing was purely fortuitous. Because the taxpayer and successor corporation were controlled by the same interests, the crop had been transferred at a zero valuation. In an arms length transaction, the crop would have been treated as having some value, to offset the expense of raising it. The situation was held to be one in which the only proper course was allocation under the terms of § 45, supra.

The instant case, like Central Cuba Sugar Co. vs. Commissioner, supra, is clearly distinguishable from

Simon J. Murphy Co. vs. Commissioner, 231 F. 2d 639. In this latter case, one corporation transferred its assets to its sole shareholder on January 11, 1950. It had accrued taxes as operating expenses on January 1st of that year, as was proper under then existing law (Magruder vs. Supplee, 316 U.S. 394). This expense was offset by but eleven days of income. Reallocation was declared to be not permissible, as the tax result under Magruder vs. Supplee, supra, would have been no different in an arms length transaction between independent corporations. The case of Central Cuba Sugar Co. vs. Commissioner, supra, was properly distinguished upon the ground that there the tax result of an arms length transaction would have been different. In the instant case, as in Central Cuba Sugar Co. vs. Commissioner, supra, the tax result brought about by an arms length transaction would obviously have been different from, and incompatible with, the tax result urged by plaintiffs. Mr. Rooney frankly testified to what was obvious, namely, that he would never have transferred the crop at a zero valuation to an independent firm or individual.

The case of Diamond A. Cattle Co. vs. Commissioner, 233 F. 2d 739, is not in point either, for it did not involve allocation of expenses under § 45, supra. Moreover, the taxpayer valued the cattle in that case by an accrual method. A fixed sum was accrued each year "as a cost of raising each critter." As the taxpayer accrued the costs of raising the cattle, "and in so accounting accrued and reported

large amounts of income not received, representing to some extent at least, the increase and growth of the animals in its herds prior to the sale of those particular animals," his situation was entirely different from that of the plaintiffs' in the instant case.

It Is, Therefore, Ordered that plaintiffs take nothing by this action, and that judgment in this case be, and it is, hereby entered in favor of defendant;

And It Is Further Ordered that defendant prepare findings of fact and conclusions of law, a form of judgment, and all other documents necessary for the complete disposition of this case in accordance with the provisions of this memorandum and order, and lodge such documents with the Clerk of this Court pursuant to the applicable rules and statutes.

Dated and Filed as of October 4, 1960.

/s/ SHERRILL HALBERT,
United States District Judge.

[Endorsed]: Filed October 4, 1960, Nunc Pro Tunc.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on April 13, 1960, before the Court sitting without a jury, the Honorable Sherrill Halbert, United States Dis-

trict Judge, presiding. The plaintiff appeared by his attorneys Howard and Prim of 111 Sutter Street, San Francisco, California, and the defendant appeared by its attorneys Laurence E. Dayton, United States Attorney for the Northern District of California, and Thomas E. Smail, Jr., Assistant United States Attorney for said District.

Oral and documentary evidence was introduced by and on behalf of both parties and briefs were filed and the Court, being fully advised, made its Memorandum and Order on October 4, 1960, ordering judgment for the defendant and ordering the defendant to prepare the following:

Findings of Fact

(1) Plaintiffs are husband and wife and citizens of the United States residing in the County of Sacramento, State of California, and are on the accrual basis of accounting for federal income tax purposes.

(2) Defendant admitted plaintiffs' allegation that $22,553.02 was paid to the District Director of Internal Revenue for deficiencies in federal income tax proposed for the years 1952, 1953 and 1954, together with statutory interest thereon to the date of payment. However plaintiffs did not offer evidence as to the amount of interest paid.

(3) At trial plaintiffs did not establish the amount of income, deductions or taxes paid for the taxable years in question for themselves individually

or their corporation. No individual or corporate income tax returns were offered in evidence for any years from which a recomputation of tax could be made. However, no recomputation of tax is called for because plaintiffs have not shown that the District Director acted arbitrarily, capriciously, or erroneously, moreover plaintiffs have not shown that they overpaid their federal income tax for the years in question.

(4) On January 28, 1957, plaintiffs filed a claim for refund for the taxable years 1952, 1953 and 1954, based on the following allegations:

The taxpayers sustained a net operating loss from farming operations for the short fiscal period January 1, 1954, to July 31, 1954. In accordance with Section 122 of the Internal Revenue Code of 1939, taxpayers carried back said operating loss to the years 1952 and 1953, and claimed a refund on payments made upon Declarations of Estimated Tax for the year 1954. On audit of the tentative carryback adjustment claims filed with respect to said years, the Commissioner reallocated the operating loss in question in substantial part to a successor corporation known as F. L. Rooney, Inc., upon the alleged authority of Section 45 of the Internal Revenue Code of 1939. The deficiencies in income tax resulting from said reallocation of expense, together with statutory interest, were paid by the taxpayers to the District Director of Internal Revenue at Sacramento, California, on November 28, 1956. Said amounts, exclusive of interest, are as follows:

Year	Deficiency in Tax
1952	$ 1,966.26
1953	19,700.28
1954	886.48
Total	$22,553.02

The taxpayers contend that Section 45 of the Internal Revenue Code of 1939 has no application to the facts of this case, and that accordingly the Commissioner of Internal Revenue was without authority to reallocate income and expense between the taxpayers and F. L. Rooney, Inc., for the fiscal periods in question.

(5) Each of the plaintiffs' claims for refund was denied in full by the District Director of Internal Revenue by registered mail on June 9, 1958. This is a suit for the refund of the income taxes alleged to have been illegally and erroneously collected from the plaintiffs for the txable years 1952, 1953 and 1954.

(6) Plaintiffs are hop farmers. They raised crops and sold them at a profit in 1952 and 1953. They raised a profitable crop in 1954.

(7) Plaintiffs transferred their 1954 crop, together with other farm assets, to their wholly-owned corporation known as F. L. Rooney, Inc., as of July 31, 1954, in exchange for all of the stock of that corporation. The corporation did not pay plaintiffs anything other than its stock, for the

valuable 1954 crop and other farm assets transferred to it.

(8) Plaintiffs deducted all of the expenses of raising the 1954 crop, up until July 31, 1954, on their individual tax return without including any income from the crop or other farm assets transferred to their corporation. Plaintiffs had their wholly-owned corporation report all of the income from the sale of the 1954 crop without deducting any of the expenses of raising the crop prior to July 31, 1954. The 1954 crop was harvested between mid-August and the first of September, 1954.

(9) As a result of deducting the expenses of the 1954 crop on their individual return and not including any income from the sale of this crop on their individual return, plaintiffs claimed a substantial net operating loss and carried it back to the years 1952 and 1953. It is this claimed loss from the profitable 1954 crop which gives rise to plaintiffs' claim for refund and this suit.

(10) The District Director of Internal Revenue, in order to reflect clearly the income of plaintiffs and their corporation, reallocated the income and expenses of the crop between the plaintiffs and their corporation. Plaintiffs did not establish just what the reallocation was that they are attacking but it is apparent that it was an equating of income and expenses which would have been reported if plaintiffs had dealt with their wholly-owned corporation as they would have with a stranger corporation which they did not control.

(11) Plaintiff admitted, and it is a fact, that he would not have transferred the valuable crop and other assets to F. L. Rooney, Inc., without any consideration if he did not control the corporation to which they were transferred.

(12) In order to clearly reflect the income of plaintiffs and their wholly-owned corporation, it was necessary for the District Director of Internal Revenue to allocate gross income and deductions between plaintiffs individually and their wholly-owned corporation.

(13) The operation of plaintiffs' farm as a sole proprietorship and the subsequent operation of the farm by their wholly-owned corporation constituted two or more organizations, trades or businesses owned or controlled directly or indirectly by the same interests.

Conclusions of Law

1. The Court has jurisdiction of the parties and this action pursuant to 26 U.S.C., 1346(a).

2. Plaintiffs' transfer of their 1954 crop and farm assets to F. L. Rooney, Inc., qualified as a transfer under § 351 of the Internal Revenue Code of 1954.

3. The District Director of Internal Revenue's action in allocating income and deductions between plaintiffs and their wholly-owned corporation was a proper and reasonable exercise of the discretion granted under Section 482 of the Internal Revenue

Code of 1954 in order to reflect clearly the income of plaintiffs and their corporation.

4. When Section 482 is applicable it necessarily overrides Section 351 of the Internal Revenue Code of 1954.

5. Plaintiffs failed to sustain their burden of proof.

6. Plaintiffs' claims for refund were properly denied by the District Director of Internal Revenue and plaintiffs should take nothing by this action.

7. Plaintiffs' complaint should be dismissed with prejudice and the defendant awarded allowable costs.

8. Judgment should be entered for defendant.

Dated: November 14, 1960.

/s/ SHERRILL HALBERT,
United States District Judge.

Certificate of mailing attached.

Lodged November 7, 1960.

[Endorsed]: Filed November 14, 1960.

In the United States District Court for the Northern District of California, Northern Division

Civil No. 7819

FRANCIS L. ROONEY and IRENE ROONEY, His Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

By reason of the law, the pleadings, and the Findings of Fact and Conclusions of Law heretofore filed in this cause,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff take nothing by his complaint, and that the complaint and this action be dismissed with prejudice and judgment be entered for defendant, and

It Is Further Ordered, Adjudged and Decreed that the defendant have and recover from the plaintiff its allowable costs of suit in the amount of $..... to be taxed by the Clerk of this Court and paid forthwith by the plaintiffs.

Dated: November 14, 1960.

/s/ SHERRILL HALBERT,
United States District Judge.

Lodged November 7, 1960.

[Endorsed]: Filed November 14, 1960.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Francis L. Rooney and Irene Rooney, his wife, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 14, 1960.

Dated: January 4, 1961.

/s/ HENRY W. HOWARD,
Attorney for Appellants, Francis L. Rooney and Irene Rooney.

[Endorsed]: Filed January 6, 1961.

In the District Court of the United States for the Northern District of California, Northern Division

No. 7819

FRANCIS L. ROONEY and IRENE ROONEY, His Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Hon. Sherrill Halbert, Judge.

REPORTER'S TRANSCRIPT
Wednesday, April 13, 1960.

Appearances:

For the Plaintiffs:
N. RICHARD SMITH, ESQ.,
HOWARD & PRIM.

For the Defendant:
THOMAS E. SMAIL, JR., ESQ.,
Assistant U. S. Attorney.

April 13, 1960—10:00 o'Clock A.M.

The Clerk: Case No. 7819, Rooney vs. U. S., Trial by the Court.

Will counsel please state their appearances for the record?

Mr. Smith: N. Richard Smith, appearing for the Plaintiff.

Mr. Smail: Tom Smail appearing for the Defendant.

Your Honor, I would like to introduce Mr. Smith to you from San Francisco, who is a partner—I guess he is not a partner, but of the firm of the office of Henry Howard, also an attorney from San Francisco.

Mr. Smith: Mr. Howard, your Honor, is Counsel for the Plaintiff in this matter, and because he is going to be a witness I will conduct the examination.

The Court: Very well. Gentlemen, I have looked over the memos that have been filed in this matter here, and I do not conceive that there is very much dispute about the facts in this case, is there?

Mr. Smith: I think perhaps with one or two minor corrections that is correct, your Honor.

The Plaintiff takes the position, your Honor, in this case, that the motives of the taxpayer which gave rise to the transaction of the moneys which

were to be allocated and so forth are of some importance in—— [2*]

The Court: Even so, all you can do is to testify as to what those intents were. You haven't got any machine that will register red when your intents are right and black when they are wrong.

Mr. Smith: That is correct. I don't know if your Honor——

The Court: Well, I have read over the statements that you made in here and I don't understand that there is any contest; that you are going to contend that certain things were done in good faith, and there is a presumption of law that people act in good faith, but there is also a burden of proof, on your side of the case.

Mr. Smith: Yes, your Honor. The plaintiff is certainly willing to stipulate that the facts are as outlined in the memorandums, if such stipulation would be acceptable to the United States Attorney.

The Court: What I would suggest in that regard is, would you be willing to stipulate that the testimony that you would offer would develop that, as distinguished—I don't know that the Government would be willing to stipulate that those were in truth the facts. They would simply be willing to stipulate that if you called witnesses they would testify in that manner.

Mr. Smith: That is correct, your Honor.

Plaintiff intends to call three witnesses: The Plaintiff, Mr. Rooney; his accountant, Mr. Watts, and his Counsel, Mr. Howard. [3]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: Well, any way you want to do it is all right with me. I was just suggesting it be handled in the most expeditious manner, because as I see it, this is mostly a question of law in this case.

Mr. Smail: I believe that is so. I don't know whether I should so stipulate or not. I am considering it seriously. First of all we take the position that the taxpayer's motives don't make very much difference. If he is a wonderful person or a terrible person, as to what the Commissioner did, that doesn't affect it too much.

The Court: I understand that is your position.

Mr. Smail: And secondly, I believe that the taxpayer admits that they were thinking of saving some taxes here. There is nothing wrong with that. The Government doesn't say that people can't use a little good common sense to avoid some taxes.

The Court: The Supreme Court has held in so many words that every citizen has the right not to evade taxes, but to avoid taxes.

Mr. Smail: The Government cannot take the position that you can't use the full letter of the law and its spirit to avoid all the taxes you can. It certainly would throw a lot of people out of business if that were the case. All of us this week are faced with filing our own taxes and we know we [4] do the best we can to pay as little as we have to. We are not taking the position certainly that there is anything improper in that.

I do have one apology, I believe, to the Court. In my opening memorandum, if I might state, I think there may be a jurisdictional question here

that I have not adequately set forth. It may be that the scope of the trial before your Honor is more narrow than I realized when I wrote this memorandum, and it may be at this time I should take and talk on that, with your Honor's permission and Counsel's permission.

The Court: Do you mean talking in terms of jurisdiction?

Mr. Smail: Yes, your Honor.

The Court: Well, we better resolve that right now, because that is fundamental with this Court.

Mr. Smail: I think it will only take me a moment to do it.

The Court: Very well.

Mr. Smail: These tax refund suits, of course, the key and the fundamental underlying thing is the claim for refund. That is the thing we found the action on. The claim for refund of taxes asserted to be erroneously collected is with the Commissioner, and if he denies it then this Court has jurisdiction or if six months passes, and he doesn't do anything about it this Court has jurisdiction to re-examine that determination and determine whether the Commissioner was right or wrong.

But the claim for refund is the only basis that the [5] Commissioner had to act upon, and in turn the only basis that the Court has to examine the Commissioner's action to see if he acted right or wrong.

If I might digress briefly, I think this is a very well drafted complaint by the taxpayer. So often they are full of a lot of irrelevant matter, and this

is a very clean one. The pleadings, paragraph 6 of the Complaint, indicate that the claim was filed and it sets for the basis upon which the Plaintiff contends in this action, and attaches it, and then paragraph 8 of the Complaint, the taxpayer said that for reasons set forth in the statement attached to the claim, which is attached, the basis for contending that the determination by the Commissioner was erroneous.

Of course, that is a proper and only basis for filing a Complaint.

Our answer merely, in paragraph 6—we admit practically everything, and in paragraph 6 we deny that they had a right to recover for the reasons set forth in the claim, and paragraph 8 we deny it is erroneous.

So clearly the question before the Court then is, was the Commissioner right or wrong in disallowing the claim for refund for the reasons set forth in the claim, both by pleadings and by the law generally.

If we look at the statement attached to the claim it is more now than the issue as the Government framed it in its [6] pretrial memorandum. That statement is confined to the question of whether the Commissioner had authority at all to reallocate. The last paragraph, I believe, is the critical one. I have been talking pretty fast about these documents, your Honor.

The Court: I have it here.

Mr. Smail: You have that claim before you?

The Court: Yes.

Mr. Smail: Thank you.

In the last paragraph there the taxpayer—it says, "The taxpayers contend that Section 45 of the Internal Revenue Code has no application to the facts of this case, and that accordingly the Commissioner of Internal Revenue was without authority to reallocate income and expense between the corporation and the individual."

That is quite a different question, I believe, than considering, as I set forth in my memorandum, assuming it was an attack on the discretion of the Commissioner to decide whether he had any authority to do this at all.

It is comparable, I suppose, to whether if this case should go up on appeal and your Honor should hold the Commissioner is right, that the taxpayer should contend on appeal first that the Court might have been wrong in making its legal conclusions or findings of fact, and secondly that they just didn't have any authority to consider the action at all. [7]

As I read this claim for refund it is the position taken by the taxpayer that the Commissioner was, and I quote here, without authority to reallocate.

I came upon this fairly late last night, and in reviewing the file and reviewing their brief I noticed that there are contentions in the brief, such as would indicate that the Commissioner didn't have authority to perform the acts he did, either because Mr. Rooney was an individual or—there is one other basic reason pointing out where they contend that there was no authority to act.

Consequently it is my interpretation of this case as it is before this Court both on the pleadings and on the necessarily jurisdictional requirements to review the Commissioner's action, his discretion in allocating this income is not before the Court, but only the question of whether he had authority at all to act under the Section.

I do now recall their other position. Their position was that one of the provisions of the Internal Revenue Code, a very old one, now Section 351 of the '54 code, which used to be one twelve three five of the '39 code, says that an individual or any other entity can transfer assets to a corporation and if immediately thereafter they are in control of that corporation that there is no tax recognized on that transfer.

Now there is no question, that is a basic provision of the [8] Code. You can transfer anything you want to of your own corporation and you are not going to be taxed on the gain. And they take the position in their brief that this section under which the Commissioner acted is just simply inconsistent with that. We are trying to reallocate the income between the individual and the corporation, and as I understand the position, section 651 says there is no tax recognized, well, this just simply goes out the window, the Commissioner is trying to do something he can't do.

As I understand it, maybe that was their position earlier and they would like to change it—maybe it is all my fault in framing the issue as to whether the Commissioner acted arbitrarily and

capriciously or unreasonably, in my own framing of the issues heretofore, that rightly or wrongly it seems to me that the Court at this time does not have jurisdiction to consider that question, but only the question of whether the Commissioner had any authority at all.

I have not attempted to make an opening statement on the facts, but bring this question to your Honor's attention at this time, and to opposing counsel. If I have misled either the Court or opposing Counsel in framing the issue in the brief I filed last week I am sorry for that, but in digging right down into the pleadings to see what that issue was, and the claim for refund, I believe it is both necessary and proper for me to call it to the Court's attention at this time. [9]

The Court: What do you say about that, Mr. Smith?

Mr. Smith: I am unable to see any substantive distinction between the question of whether or not the Commissioner was without authority to employ his weapon of Section 482, or whether he exercised a Section that was improper if, in fact, he exercised it in an improper fashion and it was not properly applicable to the case, that is, to the facts of this case, it seems to me he was without authority to employ it. If I properly understand the difference which Mr. Smail outlined, there is a material difference between the two questions. The reason whether or not the practical result achieved by the application of Section 482 is one which is

proper on the facts of this case, whether or not the issue is framed in the language——

The Court: Mr. Smith, let me pose this problem to you: Do you say there is no distinction between the authority of a man to arrest you and his right to arrest you?

Mr. Smith: Well, I am thinking in terms of the practical results or consequences of that arrest.

The Court: Well, that is what I am worried about, is the practical results. The policeman that comes down the street here certainly has the authority to arrest me if I violate the law.

Mr. Smith: That is correct.

The Court: But he doesn't have the right to arrest me [10] until such time as I do something which by law I am not authorized to do.

Mr. Smith: That is correct, your Honor, assuming he exercises his authority in a fashion that is improper, that is, under circumstances where he does not have the right, and I have a civil remedy for being arrested as a consequence of this breach of authority, which is the same thing from a practical standpoint that this taxpayer is doing, that is, filing his application for refund on the basis that the Commissioner was either without authority to apply this section or that he applied it in a fashion that was unreasonable, capricious or arbitrary.

The Court: Well, let's put this thing on another situation. We have got a question of search and seizure, illegal search and seizure. Is it your position that if a person makes an illegal search, that is, a search made without authority, even though——

Mr. Smith: That is, made without right, your Honor, even though with purported authority?

The Court: Well, I am trying to distinguish between these two words, "Right" and "Authority." In other words, I am a police officer. I make the search and seizure. If I had a search warrant there wouldn't be any question about it, my search would be perfectly legal.

Mr. Smith: Assuming the warrant was [11] valid.

The Court: Yes, a valid search warrant. But I have no search warrant, and I think because of certain other phases—for instance I am making this search in connection with an arrest, and one of the more recent situations is where you arrest a tenant, as to whether or not you have the right to search the landlord's house, and I think I have that right, and I go ahead and search the house.

Is there a distinction between my authority to do that and my right to do that?

Mr. Smith: Well, I would assume, your Honor, that—frankly that is a facet in which I am not well versed.

The Court: Well, I realize we are dealing in semantics here.

Mr. Smith: My offhand reaction would be——

The Court: We are really doing some work on the high bars.

Mr. Smith: Yes, a double somersault, I would say.

Authority is a standard which when applied seems to be given purported ability to carry out

the act in question. The ultimate determination of the right to do that, I would say that the authority is a prima facie standard, whereas the ultimate fact or the ultimate decision rests upon the question of right.

Now the Commissioner in this circumstance is the investigative officer who conducts the search, has exercised what appears to be authority. He has met the standard, and he [12] alleges that what he has done in this case was to more clearly reflect income.

We are now faced in this Court, as I view it, with the question of determining whether or not the Commissioner had the right to exercise such authority. And it seems to me this is what we were talking about when we say he is without authority or he has exercised it improperly.

The Court: Mr. Smail, what have you got to say about it?

Mr. Smail: The words "right" and "authority" I think I would be willing to give either one. I think the arguments in their brief about this section being necessarily inconsistent with some other section which they proceeded under, and which the Government admits they proceeded under, your Honor, and it was proper to proceed, there was nothing wrong with their use of Section 351 by itself, really does not quite strike home. The purport of both of those arguments is that the Commissioner is without right or authority. In other words, he just can't come in here and do it at all. It is not

that he used bad judgment or was capricious or unreasonable in doing it.

That is inside the bounds of the right or authority to do something. Whether you do it well, or whether you do it poorly——

The Court: Is not that like the officer who makes the arrest of the tenant, and therefore honestly believes that he has the right to search the entire house of the landlord? [13]

Mr. Smail: I think it is. I think it is also similar to the somewhat offhanded analogy I made when speaking to your Honor first, that if this very matter should go up on appeal and a tack was taken that this Court had no right or authority to consider the matter, that is an entirely different question from saying that the facts were clearly erroneous or the legal conclusion was wrong. To say that somebody doesn't have any right or authority to do something means they just can't do anything, right or wrong. They just can't even make a stab at it.

The Court: Well, it is just like saying that the search was made by a citizen.

Mr. Smail: That is right.

The Court: It has no color of authority at all.

Mr. Smail: I believe that is a proper analogy, particularly where we get into the position where a police officer could make an arrest under suspicion and a citizen could not. And if he came in and it was said he had no authority and we put him on the stand and establish that he was a police officer and he had suspicion, then I think it would be

their burden to go forward. That would really end the case. He would have authority, and then we would determine whether the search was proper.

The Court: Well, I think I have this problem in mind here at the present time, but I think that this case is of [14] sufficient brevity that there will be no occasion to stop right now and say, "We are going to decide this point." Why can't we get the whole thing before me? I take it that you raise that issue now——

Mr. Smail: I do.

The Court: And will so contend throughout this case.

Mr. Smail: I do.

The Court: That this case is limited by these words, "Was without authority to reallocate the income and expenses between the taxpayer," and so forth.

Mr. Smail: Right, sir, and I make it on two grounds, both the pleadings and the basic law in this area as to how we should view this, what was presented to the Commissioner and I also agree, your Honor, that we should go ahead with the trial. Although I am in Sacramento occasionally and these gentlemen are both from San Francisco and their client is here, and I don't believe the trial would take long, and I think that it might be an inconvenience for them to have to come back again.

The Court: Is that agreeable, Mr. Smith?

Mr. Smith: Yes, your Honor.

The Court: In other words, unless you are going to be prejudiced by this situation——

Mr. Smith: No.

The Court: ——that would be the way I would suggest doing. [15]

Mr. Smith: I might say that in view of the objection which Mr. Smail has presented, it will be the intention of the Plaintiff throughout the testimony to demonstrate that the Commissioner was without authority in the sense that the exercise of his authority was improper under the circumstances of this case, if such a decision exists. In other words, reaffirming our position that there is no substantive distinction between the two.

The Court: All right, let us proceed.

Mr. Smith: I might also at this time, your Honor, apologize to the Court for several errors which appear in the memorandum which was filed by the Plaintiff. I think that——

The Court: Well, don't worry about it, Mr. Smith, because I might just as well tell you right now that I am going to require you to file written memorandums in support of your respective positions in this matter and you can correct the whole thing, and get it in sharp focus at that time.

Mr. Smith: All right, your Honor. Fine.

If your Honor please, this is a suit for recovery of overpayment of income taxes paid by the Plaintiff with respect to the year 1954.

The action was filed pursuant to the provisions of Section 6532 of the Internal Revenue Code of 1954.

The controversy arises out of the following facts, which [20] I will briefly summarize:

Mr. Rooney, during the year 1954 and for many years prior thereto was engaged in the business of farming a crop on leased land in Sacramento County. He carried on his business as a sole proprietor.

In 1954, as he is today, he was a married man. At that time he had two adult sons, one of whom was serving in the army in Korea, the other was a part-time employee in the family business, and also was a part time college student.

The income tax returns of the Plaintiff and his wife for the years involved in this proceeding were prepared by Mr. Wendell Watts, a Certified Public Accountant here in Sacramento, whom the Plaintiff intends to call as a witness.

As the evidence will show, early in the spring of 1954, Mr. Rooney had occasion to consult with Mr. Watts with respect to the preparation of his income tax returns for 1953. At that time, due to the fact that his Federal Income Taxes paid for the year 1953 exceeded the sum of $32,000 he had a discussion with Mr. Watts with respect to effecting some reduction in his Federal Income Tax liability.

Secondly, he was interested at that time in passing some present interest in his business to his two sons.

With these objectives in mind he suggested the possibility of the formation of a partnership.

Mr. Watts, as his testimony will show, suggested that a [21] corporation would perhaps be a more appropriate entity under the circumstances, and to reaffirm that judgment and to implement such a

program, it was decided upon Mr. Watts' suggestion to consult Mr. Henry Howard, who was a tax attorney in San Francisco.

As a consequence of that suggestion a joint meeting between Messrs. Watts, Howard and Rooney was held at some time in the spring of 1954, toward the end of April, according to the files of the Plaintiff's Counsel.

At that meeting there was a full consideration of all the range of Federal income and State tax problems.

Mr. Smail: I think it might be appropriate for me to interrupt and say that I will stipulate to everything opposing counsel has said so far as the background testimony, and I will agree just the words that are in the record are true, if we can save any time.

Mr. Smith: Fine, your Honor. We are perfectly willing. I don't wish to waste the Court's time.

The Court: All right.

Mr. Smith: As a consequence of these discussions it was decided to form a corporation. Plaintiff, as the testimony will show, at the time he consulted with his advisors was in no wise aware of the fact that the formation of a corporation or the selection of an effective date for the transfer of the assets of his business to the corporation would result in the [22] opportunity to avail himself of the provisions of 122 of the Internal Revenue Code of 1939 relating to the carry-back of a net operating loss. That possibility was first discovered by his

accountant, Mr. Watts, in July of 1954, and the decision was made without the knowledge of Mr. Rooney and it, in no sense, was a motivating factor in his consultations or in his decisions with respect to the transfer which was subsequently effected.

It has been stipulated by the parties as to the date of incorporation of F. L. Rooney, Inc., the successor corporation, as to the date on which the assets of the sole proprietorship was transferred to that corporation, to wit, July 31, 1954, in exchange for all the stock of the corporation.

Consequently, upon the discovery that a net operating loss would be available, a claim for refund was filed, and a refund was paid thereon in the amount of approximately $22,000.

Subsequent to that the Internal Revenue Service, under the purported authority of Section 482, reallocated the expenses incurred by Mr. Rooney, operating as a sole proprietor, to the corporation, thus establishing a deficiency in the income taxes.

I think your Honor is aware of the meaning of the literal language of Section 485 and of its successor, 482.

The issue in this case is, of course, whether the taxpayer has the right to the refund which arose out of the net operating [23] loss generated by the transfer to the corporation of the assets of the sole proprietorship on this mid-year date, and whether or not the express release provisions of that section can be thwarted by the exercise by the Commis-

sioner of the alleged authority conferred on him by Section 482.

I might say in summation, your Honor, that so far as the Ninth Circuit is concerned this is a case of first impression. It appears to the taxpayer to be an issue of some real substance and merit. It was first considered, I think, in essentially this form by the Tax Court in the Central Cuba Sugar Case, where the holding was favorable to the taxpayer.

That case, of course, went to the Second Circuit, where the tax court was reversed, and since then there have been two other Circuit Court of Appeals decisions which we think have real pertinence in the action, and which we will comment upon at a later point.

(Discussion between Mr. Smail and Mr. Smith, inaudible to reporter.)

Mr. Smail: May the record show that Counsel and I will stipulate that Mr. Rooney as an individual during the year 1954 was on an accrual basis of accounting.

I have no particular difference with Counsel's statement of facts, but I believe I wrote down three brief things. One was the date the assets were transferred to the corporation. We were rather careful to stipulate that was a transfer as of a [24] certain date. We are not agreeing that those assets were in fact transferred.

Secondly, although I just don't know about their consideration or awareness of these tax advantages

of this transfer, I am aware of the very good reputation of Mr. Henry Howard as a tax attorney and the C.P.A., Mr. Watts. It seems a little strange to me, but I don't think it really makes any difference whether they were aware of it or not, whether they considered it or not, doesn't make too much difference. I believe the only question we are considering is the jurisdictional question of whether——

The Court: How about the presumption in the law that everyone is presumed to know the law? That is a violent presumption, but I think it is a presumption that we have to indulge in once in a while.

Mr. Smail: Well, as I say, my presumption, my personal presumption would go a little farther. I know the good reputation of Mr. Henry Howard as a tax attorney. It seems strange to me, but I don't think it is a matter of importance. We are not reviewing the taxpayer's intent or that of his agents or attorneys.

It is quite proper that people do set up corporations to make moves to save substantial taxes. Those are proper motives.

In this action since both businesses were controlled by the same individual, Congress has given the Commissioner [25] discretion to allocate that income if it does not accurately reflect annual accounting concepts on the books of those businesses. He has exercised that discretion, and that is what we are reviewing, if we can go that far. I don't wish to state again the earlier proceedings about the more limited——

The Court: I understand you are not waiving that at any stage of this proceeding?

Mr. Smail: Right, sir.

The reason for this section is a very basic premise of our Federal Income Tax in this Country, namely, it is on an annual accounting basis, and whether it is easy or difficult, each year we have to figure out taxes, and we have to pay taxes each year. It is a difficult thing to operate and we need money every year, and that is the way we try to do it.

This section is only pointed at an individual or corporation which controls two businesses to transfer assets or some other activity in an attempt to distort that annual accounting concept and, as in this case, make a substantial profit look like a loss for that year and a loss the year before, and a year back, where three years' taxes were recovered although there was in fact a substantial profit, because, and only because of the control of the two businesses a loss was able to be reported here. The Commissioner said that "That does not accurately reflect income," and exercised his power. [26]

The only other comment about the Court of Appeals of the Ninth Circuit, I believe they have before it for review under Section 41, only three sections away or four sections away from Section 45, where it is said that you must attribute income to the corporation or individual, this is U. S. vs. Lynch, which was relied upon in part by the Court of Appeals of the Second Circuit in Central Cuba Sugar, and is almost dead on point here and the leading case in this area.

Again this is approaching a legal discussion, which I think should be reserved.

I have no further opening statement, your Honor.

The Court: All right, you may proceed.

Mr. Smith: We will call as our first witness, your Honor, Mr. Francis Rooney.

FRANCIS L. ROONEY

one of the Plaintiffs herein, called for the Plaintiffs, sworn.

The Clerk: Your name?

The Witness: Francis L. Rooney.

Mr. Smith: To expedite the proceeding, your Honor, I was just trying to go through the proposed direct examination of Mr. Rooney to see if we can get some factual issues upon which there appears to be some dispute.

The Court: Well, that is what I wish you would do, even if you have to take a little time to orient yourself, because [27] there is no use of my sitting here and hearing testimony on matters on which there is no dispute.

Mr. Smith: If Counsel has no objection, perhaps we could recess——

Mr. Smail: You seem to have your testimony all typed up.

Mr. Smith: Yes, and if Counsel has no objection to the procedure, if I might employ leading questions until such point as he finds it objectionable, we could perhaps move through the background stuff very rapidly and get to the critical questions.

(Testimony of Francis L. Rooney.)

The Court: Very well.

Mr. Smail: From just a brief glance it appears that quite a bit of this is immaterial and may be——

The Court: Do you want to take a couple of minutes to go over this, take a little recess and go over this and get oriented?

Mr. Smail: It might be a good idea.

The Court: I would like you to do your threshing before you get in here. I like to have the grain in here.

Mr. Smail: Yes, sir.

Mr. Smith: That will be fine, your Honor, if you give us five minutes.

The Court: We will take a brief recess at this time and let me know as soon as you are ready to proceed.

(Recess.)

Mr. Smith: Counsel for the Government, your Honor, has reviewed the format of the direct examination, including the [28] questions and answers, which would have been followed were Mr. Rooney examined.

We have agreed, with your Honor's permission, that we will just submit this to the Clerk for the record, if that is permissible.

Mr. Smail: The Government so stipulates, your Honor.

The Court: All right, let it be received and marked Plaintiff's Exhibit 1.

(Testimony of Francis L. Rooney.)

Mr. Smail: It may be that I would like to cover one or two of these items on cross-examination.

The Court: That is perfectly all right.

Mr. Smail: I do agree this would be his testimony if he testified in regular fashion.

(The format of the direct examination of Francis L. Rooney was marked Plaintiff's Exhibit No. 1.)

PLAINTIFFS' EXHIBIT No. 1

Ques.: Please state for the record your name, address and your occupation.

Ans.: I am Francis L Rooney of ..... and I am in the business of raising hops.

Ques.: How long have you been engaged in this business of raising hops?

Ans.:

Ques.: Did you operate your business as a sole proprietor prior to 1954?

Ans.: Yes.

Ques.: During those years was your business generally profitable?

Ans.: Yes.

Ques.: Had there been any marked increase in your taxable income from farming operations during the few years immediately preceding 1954?

Ans.: Yes (explain).

Ques.: Prior to 1954 you had who, if anyone, had

(Testimony of Francis L. Rooney.)

Plaintiffs' Exhibit No. 1—(Continued)

assisted and advised you in connection with your income tax returns?

Ans.: My accountant, Mr. Wendell Watts.

Ques.: Did you have occasion to talk with Mr. Watts some time during the spring of 1954?

Ans.: Yes, I did.

Ques.: What was the subject of that conversation?

Ans.: It had occurred to me that instead of realizing all of the income from my farming between myself and Mrs. Rooney, it would be advisable to give my two grown sons some interest in the business. What I hoped to do was to reduce my own personal income taxes, as well as to give the boys some income from the farm that would be taxable to them and to make them feel as though they were a definite part of our family business.

Ques.: Did you have any specific suggestion to discuss with Mr. Watts with respect to accomplishing the objectives which you just outlined?

Ans.: Yes, I thought perhaps we could form a partnership.

Ques.: What did Mr. Watts advise you?

Ans.: He suggested that I consult with Mr. Henry Howard, a tax attorney, in San Francisco.

Ques.: Did you then meet with Mr. Howard and Mr. Watts during the spring of 1954?

Ans.: Yes.

Ques.: What did they suggest?

Ans.: Mr. Howard explained to me that forming

(Testimony of Francis L. Rooney.)

Plaintiffs' Exhibit No. 1—(Continued)

a partnership would not be feasible as the assets of my business were for the most part leaseholds and a couple of undivided interests in real property. He explained that it would be very difficult to transfer a partial interest in those to my sons. He also mentioned that one of my sons was in the Army in Korea and the other only worked part-time on the farm while going to college, that the Government might not recognize this as a valid partnership for tax purposes. To solve my problem, he seemed to suggest that we form a corporation.

Ques.: Did Mr. Howard make any additional suggestions to you as to what might be accomplished through the organization of a corporation?

Ans.: Substantial reduction in income tax liability due to lower corporate rates. He mentioned that giving this stock would reduce the amount of federal estate taxes which would have to be paid on my death.

Ques.: To the best of your recollection, Mr. Rooney, did either Mr. Howard or Mr. Watts mention to you during these preliminary discussions the possibility that the organization of a corporation would result in your having substantial expenses incurred in 1954 which would not be offset by any income?

Ans.: To the best of my recollection there was no mention of anything of this nature by either of them.

(Testimony of Francis L. Rooney.)

Plaintiffs' Exhibit No. 1—(Continued)

Ques.: Were at that time aware of the meaning of the term "net operating loss"?

Ans.: No.

Ques.: Did you then decide to proceed with the formation of a corporation?

Ans.: Yes.

Ques.: Now, Mr. Rooney, let's turn just for a moment to some of the fundamentals of the hop raising business. Would you describe for us, generally speaking, the periods in any calendar year in which expenses are incurred and in which income is earned?

Ans.: (Give a brief description of your expenses, including the fact that planting and cultivation expenses are always incurred during the early part of the year and the only expenses in the Fall are in connection with the harvest—then point out the approximate time during which the crop is harvested and the fact that that is the point in time at which income is received.)

Ques.: Now the parties have stipulated that the crop of hops which were sold in the Fall of 1954 and which gave rise to the income which the Commissioner has reallocated in this case was sold by you to S. S. Steiner, Inc., on January 22, 1954. Would you give us a brief description of how those contracts are made?

Ans.: (Give here just a summary of the way you normally deal with S. S. Steiner, including that

(Testimony of Francis L. Rooney.)

Plaintiffs' Exhibit No. 1—(Continued)

you may sell one, two or more years of crops at any time and that the price is fixed.)

Ques.: Is the purchaser, Mr. Rooney, required to pay the price which is set in the contract, regardless of the condition of the crop?

Ans.: Not by any means. The crop has to meet a number of exacting standards.

Ques.: Would you describe those standards for us?

Ans.: (Give here, or mention here what the normal requirements are, including moisture content, delivery dates, etc.)

Ques.: If these standards are not met, is the purchaser obligated to take the crop at any price?

Ans.: No. He has the right to reject it entirely, or sometimes we might renegotiate a lower price.

Ques.: Then, is the income to be realized from the sale of any given crop not certain until the size and quality of the crop is determined?

Ans.: Yes. That's correct.

Ques.: Let's return then to the formation of this corporation. It has always also been stipulated by the parties that F. L. Rooney, Inc., was had its Articles accepted for filing on May 27, 1954. What is your recollection, if any, of what Mr. Howard may have told you with regard to the length of time it would take to get the corporation organized and the assets of your business transferred to it?

Ans.: Mr. Howard didn't give me any specific period. As I recall, he told me that it would take

(Testimony of Francis L. Rooney.)

Plaintiffs' Exhibit No. 1—(Continued)

several months to get the Articles filed and to get a permit to issue stock from the Corporation Department.

Ques.: It has also been stipulated that the transfer of the assets of your business to F. L. Rooney, Inc., your corporation, occurred as of July 31, 1954, and that the corporation gave in exchange all of its issued stock. Did you, Mr. Rooney, make the decision as to the effective date for the transfer of your assets to the corporation and for the closing of the books of your sole proprietorship?

Ans.: No. I assumed that it would be effective as soon as Mr. Howard could get the job done.

Ques.: Who made that decision?

Ans.: Mr. Howard and Mr. Watts.

Ques.: Was that date of transfer discussed with you before July 31, 1954?

Ans.: No. I left it to Mr. Howard and Mr. Watts.

Ques.: Were you later informed of the results of selecting that date?

Ans.: Yes.

Ques.: What is your recollection as to when and by whom that matter was discussed with you?

Ans.: I know that it was in the early Fall that either Mr. Watts or Mr. Howard, probably Mr. Watts, told me about this operating loss because I told them that if they got the refund for me I would buy them both of them season tickets to the 49ers football games.

Ques.: Did this net operating loss influence you

(Testimony of Francis L. Rooney.)

Plaintiffs' Exhibit No. 1—(Continued)

in any way or at any time with regard to whether the corporation should be formed or when it should actually acquire your assets?

Ans.: Never.

Ques.: Now, Mr. Rooney, you indicated earlier that it was your intention at the time this corporation was formed to give some interest in it to your two sons. Is that correct?

Ans.: Yes.

Ques.: Has that ever been done?

Ans.: No.

Ques.: Why?

Ans.: (Can you explain this?)

Ques.: Now, Mr. Rooney, going back to your statement with regard to the expenses of raising a crop, as I recall the only expenditures in the Fall are connected with the harvest. Is that correct?

Ans.: Yes.

Ques.: Is F. L. Rooney, Inc., on a fiscal year?

Ans.: Yes.

Ques.: When is that fiscal period?

Ans.: Aug. 1 to July 31.

Received in evidence April 13, 1960.

(Testimony of Francis L. Rooney.)

Direct Examination

By Mr. Smith:

Q. Mr. Rooney, to put this in context, in connection with the discussion of the income and expenses which are incurred or realized in the production of any particular hop crop, I should like to ask you if, for example, you decided that you would raise your last crop of hops in the year 1961, is it correct that the entire income of the corporation for that fiscal year would be earned after July 31 of 1961? A. That is correct.

Q. What expenses, Mr. Rooney, would the corporation have [29] during the fiscal year beginning August 1 of 1961 and running to July 31 of 1962, assuming that your last crop was in the fall, what expenses would you have?

A. The crop in '61, the only expense would be the harvesting and the shipping expenses.

Q. There will be no expenses during that fiscal year incurred in Planting and growing the crop?

A. No.

Q. Would this then be, as a practical matter, the opposite case to the year 1954, in which you had expenses in the period January 1 to July 31 with no income because of the harvest date falling after July 31 of that year?

Mr. Smail: I object to that question, your Honor, because the entrance of the sole proprietorship in 1954 changes the matter substantially.

(Testimony of Francis L. Rooney.)

The Court: Sustained. I think it is a matter that can be resolved by simple analysis anyway.

Mr. Smith: That is the only reason for the question, your Honor. I think it is self-explanatory on an analysis of the facts previously introduced in the record. We have no further questions.

The Court: All right, Mr. Smail.

Cross-Examination

By Mr. Smail:

Q. Mr. Rooney, some of the testimony that Counsel and I have already stipulated to that you, in effect, [30] have already given, it is stated that you had two reasons for wanting to form a partnership or corporation in 1954, one was to save some taxes, and the other was to bring your sons into the business? A. That is right.

Q. Have you brought your sons into the business?

A. Well, I have them working with me, and I intend to give them stock in the corporation.

Q. Have you done so, sir, as of 1960?

A. No; I haven't.

Q. You and your wife own all the stock in the corporation? A. That is right.

Q. And you and your wife are the sole owners of your ranch business as a sole proprietorship prior to the time of the formation of the corporation?

A. Well, I operate on leased land, but I am the sole owner of the business, my wife and myself.

(Testimony of Francis L. Rooney.)

Q. Thank you, sir.

A. I was operating on leased land at that time. At the present time I own land.

Q. Aside from the question of the two businesses, that is, the proprietorship and the corporation in 1954, if we just threw them all into one pot, is it fair to say that a substantial profit was made on the 1954 crop?

Mr. Smith: I object to that question, your Honor, as [31] calling for a conclusion of the witness.

Mr. Smail: I think it is fair to see whether the '54 crop made money or lost it. I think that would be a fact for the Court to consider.

The Court: You have to have more foundation for it. What do you mean by the '54 crop?

Mr. Smail: Well, yes, maybe I should ask some more questions. It is summed up in that opening testimony.

Q. Was your business, sir, prior to the formation of the corporation, that of a hop rancher?

A. Yes.

Q. Was that the business of the corporation when formed, or when it came into operation?

A. Was it operating?

Q. No; was raising hops the business of the corporation after it was formed? A. Yes.

Q. And I believe your testimony that has already been stipulated to was that in the years prior to 1954, particularly in '53, you made quite a bit of money on the 1953 crop? A. Yes.

(Testimony of Francis L. Rooney.)

Q. My question is, although the issue before this Court, or one of the questions is whether we should be allocating expenses and between the proprietorship and the corporation, if you didn't look at those entities and looked to see how much money either you or the corporation spent to raise the crop [32] and how much you got, if the crop was successful to either you or the corporation. In other words, did you make a profit, was the hops crop a profitable thing, if we can just put aside these other questions in issue for a moment?

A. I am a little hard of hearing. I didn't get all that question.

Q. It was too long. This is what I want to find out, Mr. Rooney: You have already testified by stipulation that the '53 crop was quite profitable. In other words, you got more money out of the hops crop than you put into it?

A. That is right.

Q. Is that the same case in 1954, if you just consider how much money went into the crop whether it was corporation or individual, and how much money you got out of it? Was it a profitable crop? A. It was.

Q. Thank you. Did you get any money from the corporation when you transferred your farming assets and crop to them?

A. Did I get anything from——

Q. Yes, any money? A. No.

Q. Did you get any other property that had a substantial fair market value in lieu of money?

(Testimony of Francis L. Rooney.)

A. I got stock in the corporation.

Q. You didn't declare that as income on your return, though, did you, the receipt of that stock, the value of it, if any?

A. Well, I would say you would have to ask my income tax man on that. [33]

Q. Well, the corporation had no——

Mr. Smith: We will stipulate the corporation had no assets.

A. The corporation had no assets.

Q. (By Mr. Smail): Your attorney has stipulated to that. That is right, the corporation had no assets other than those you were transferring to it, is that correct? A. That is right.

Q. I assume you wouldn't have transferred that quite valuable crop and assets to a corporation unless you controlled it, would you, sir, without receiving any money for it?

A. That is right.

Q. I would like to find out just when these assets were, in fact, transferred, Mr. Rooney. Maybe you can tell us what the assets were that were transferred, first?

A. Well, the assets at that time were appraised and they were appraised at quite a high price. My assets vary with the price of hops. My assets, when hops are good they are worth money, when they are cheap they are not worth anything. At the time that the corporation was formed I think it was appraised at about $196,000.

Q. Did you transfer any equipment?

(Testimony of Francis L. Rooney.)

A. That was the whole thing, equipment and leases and money in the bank and everything that——

Q. Did you transfer the hops themselves, or the trellises? [34] A. Yes.

Q. Mr. Rooney, I have been in town only a brief time, but I have been scurrying around the Recorder's office and various places, and I can find no notation of transfer either under real property, under the Tax Assessor's office, of the trellises or the hops, all the things are still listed in your name, except the real property, which you leased, and I find no change of title. Can you explain that to me?

A. No; I can't explain that to you. It was never brought to my attention.

Q. Was it brought to your attention that it was in fact transferred? The only notation I find is in assignment from you to the corporation for the following year of the crop mortgage approved by Mr. Steiner of Steiner, Incorporated, which was under contract to buy the crops, that being an agreement dated February 16, 1955, which was recorded on March 28, 1955. Was anything else actually transferred of record? Any other assets?

A. Well, as far as I was concerned, I thought the whole works had been transferred from my ownership to the corporation. Now I didn't realize that it hadn't been recorded. In fact, I thought when they formed the corporation that took care of everything.

Q. Just the forming of the corporation itself

(Testimony of Francis L. Rooney.)

would have taken your assets and put them in the corporation, is that what you mean? [35]

A. Yes.

Q. What about when you received the notice of the tax assessment from the County office here on those hops and trellises which are still in your name, didn't it seem strange to you, that it should be in the corporation's name, that the corporation owns them?

A. As far as the hops, I never had any hops for the Tax Collector——

Q. What about the trellises, though?

A. Well, they have been assessed against me right along.

Q. You, individually?

A. Well, I would have to look at those tax bills, but I thought they were coming to F. L. Rooney, Incorporated. I could be wrong. But as far as I can remember they come to F. L. Rooney, Incorporated. Now, I would have to check on that to be sure.

Q. What about the transfer which is of record of the writing or contract with Steiner, Incorporated, which was not recorded until March 28, 1955? That is a year after this tax year. What is your recollection about that?

A. Well, I don't record those contracts. They record those themselves.

Q. Who do you mean by "themselves"?

A. The Steiner Company. I have nothing to do with recording those. I notify them——

Q. If I might interrupt you, I may have been

(Testimony of Francis L. Rooney.)

misleading. What [36] I am talking about was the assignment of the right under the Steiner contract from you to your corporation, Rooney, Incorporated. This is what was recorded.

That was only approved by Steiner because they had some interest in the crop. Now that wasn't recorded until the following year.

A. Well, as I say, I notified them that we were changing from private ownership to corporation and as far as when they recorded it, I couldn't say. As I say, I have nothing to do with the recording of the contract.

Q. Mr. Rooney, this agreement was dated February 18, 1955. It wasn't recorded until a month later, but there was no agreement until February 16, 1955, on the books of the recorder, even though it wasn't recorded until March 28th, the agreement itself is dated in that year.

A. Well, I couldn't give you exact dates on that. The Steiner Company has a local representative right in Sacramento here, and he knows every move I make. I talk to them two or three times a week. They knew I was incorporating, and as far as when those papers were recorded I wouldn't know, because I notified them that I was incorporating and they knew it, and as far as when they recorded those papers I wouldn't know anything about it.

Q. Well, what about the time—it is your complete testimony that it is your understanding that just when that corporation [37] was formed, which

(Testimony of Francis L. Rooney.)

was in May, I guess, in 1954, that that automatically transferred your farming assets?

Don't you have any recollection of signing bills of sale or something you mentioned earlier, a transfer of leases and these other documents?

A. Well, the leases—there was a notation made on the lease that the corporation was taking over the lease that had been in my own personal name.

Q. You didn't record that, though? Did you just make a pencil notation on the copy of your lease, is that what it is?

A. No; we had some papers drawn up in the lawyer's office that I would be responsible for the assets—I would personally be responsible for the payment of rents and the assets of the F. L. Rooney Corporation.

Mr. Smith: Your Honor, if I may, I would like to make objection to the materiality of this testimony, in view of the stipulation by the parties as to the formation of the Corporation and as to the fact that the transfer of the assets was effected as of July 31, 1955.

Mr. Smail: As of—as of—it is important, though, when those assets weren't transferred until the next year. It sure does change this case.

The Court: That is what I understood Mr. Smail to state, that he was unwilling to stipulate that they were in fact [38] transferred, but they were transferred as of that date.

Mr. Smail: I am willing to stipulate what the books show.

(Testimony of Francis L. Rooney.)

Q. Mr. Rooney, if the agreement between you and the corporation transferring your right to sell the hops to Steiner, Incorporated, was dated February 16, 1955, would it be your recollection that your attorneys or whoever handled this got around to transferring your other assets about that time?

A. Well, now, to be honest with you I have no idea on that, because I thought when these corporation papers were drawn up that automatically everything would go on record that I had formed the corporation and that the assets, as far as I was concerned, they were all changed to the corporation. Now, as far as being a matter of record, I thought that was all taken care of. I didn't know. It was a legal matter and I know that I had to sign papers that I would personally be responsible for any debts of the corporation, and I signed papers with the Steiner Company that I would still be held responsible for the delivery of the hops and so forth by the corporation.

Q. You know that the corporation wasn't even given power to issue stock by the State of California until toward the end of August, 1954, August 24th or something like that?

A. Well, I know—as far as I was concerned, my fiscal year was to begin on August 1st, and when I got all those records [39] back from the Corporation Commissioner, why, then, I was—I understood I could issue stock any time.

Mr. Smail: I believe there is a stipulation to the contrary, your Honor.

(Testimony of Francis L. Rooney.)

Mr. Smith: Pardon, counsel? I am sorry.

Mr. Smail: There is a stipulation that the State of California authorized the issuance—first authorized the issuance of stock on August 24th, isn't it?

Mr. Smith: Yes.

Mr. Smail: ——1954.

Mr. Smith: The terms of that permit, Counsel, will show that the issuance of stock was authorized as of July 31st.

Mr. Smail: Yes.

Q. Mr. Rooney, do you have any documents or bills of sale, or transfers or assignments of leases or anything in court with you today that show when these assets were, in fact, transferred, if ever?

A. I have no papers with me today, no.

Q. Do you have any recollection of signing over any bills of sale of either equipment or the hops or the trellises here in issue?

A. Well, as I told you before, I was forming a corporation, and all the assets were transferred to the corporation.

Q. How was that? How did that happen?

A. Well, I have a book with all the corporation in it, and it [40] shows when the assets were changed.

Q. I know that. It has got a date on there, July 31, as of that date? A. Yes.

Q. It says, "As of." A. Yes.

Q. What we want to know is when those assets were really transferred. That is a little early, even

(Testimony of Francis L. Rooney.)

before you could issue stock in exchange for the assets, almost two months afterwards.

A. I don't want to get confused on these dates.

Q. Please believe me, sir, I am not trying to confuse you. I am only trying to establish when those assets were, in fact, transferred?

A. Well, in fact if you asked me, I would say when the corporation was approved by the State Corporation Commissioner. I would say that is when the transfer was made, because they were all assigned to the corporation.

Q. Is there some document that assigned them?

A. Pardon me?

Q. Is there some document that assigns these assets?

A. Well, there was a list—no, there was just a list of the assets that were incorporated in there, and the papers were drawn up and they were in the corporation, as far as I was concerned. [41]

Q. Even though there was no official transfer from you to the corporation? A. Yes.

Mr. Smail: No further questions, your Honor.

Redirect Examination

By Mr. Smith:

Q. Just two brief questions, Mr. Rooney: Had any income been realized by the sole proprietorship prior to July 31 of 1954?

A. No income whatever.

Q. Did the sole proprietorship as operated by

(Testimony of Francis L. Rooney.)

yourself actually pay all of the expenses incurred prior to July 31 of 1954? A. Yes.

The Court: What do you mean by the sole proprietorship?

Mr. Smith: I meant the business as operated by Mr. Rooney individually, your Honor.

The Court: It was my understanding that he and Mrs. Rooney owned it. There was some community property somewhere in here that somebody was talking about.

Mr. Smith: Yes. I think your Honor is correct. I should rephrase that and state that the business was operated by Mr. Rooney individually with the co-ownership of his wife.

The Court: This is community property?

Mr. Smith: Yes.

The Court: Of Mr. and Mrs. Rooney?

Mr. Smith: Yes, that is right. [42]

The Court: That is why I questioned the word "solely."

Mr. Smith: Yes. Your Honor is correct.

Mr. Smail: I would like in open court to avoid —well, I think I will withdraw that suggestion.

The Court: Is this all for Mr. Rooney then?

Mr. Smith: That is all.

The Court: That is all, Mr. Rooney, thank you.

Mr. Smith: Call Mr. Wendell Watts.

WENDELL WATTS

called as a witness for Plaintiffs, Sworn.

The Clerk: Your name?

The Witness: Wendell Watts.

Direct Examination

By Mr. Smith:

Q. Will you state, for the record, Mr. Watts, your occupation?

A. Certified Public Accountant.

Q. What is the name of your firm?

A. Watts, Thompson & Company.

Q. How many years have you been qualified as a Certified Public Accountant.

Mr. Smail: I will stipulate Mr. Watts is a C.P.A. and is well qualified.

Mr. Smith: Fine.

Q. I have one question in that connection, Mr. Watts: Could the income of this corporation earned during the period August [43] 1, 1954, to July 31, 1955, under any theory of accounting have been attributed to F. L. Rooney individually, or to Mr. and Mrs. Rooney?

A. No; it was a corporation from that time.

Q. Under no theory of accounting could it have been attributed to Mr. Rooney on an accrual theory or cash basis theory? A. No; it could not.

Q. Now you were consulted by Mr. Rooney in the spring of 1954? A. That is right.

Q. Would you relate to us—as you observed this morning, there is some divergence between the Government and the taxpayer—the substance of those

(Testimony of Wendell Watts.)

conversations, that is, the making of decisions with respect——

Mr. Smail: I can't hear you.

Mr. Smith: What I am trying to do, counsel, is to summarize and just get to the one point with respect to the net operating loss.

Q. Would you describe for us how that possibility arose?

A. Well, as I remember—I will have to stipulate it is from memory—of course, some time after the filing period, presumably in April or May, Mr. Rooney came to me with the idea of in some way diverting part of his income to his two sons who recently were out of college and had become active in the business, and suggested forming a partnership with them. I, [44] as I usually do, discouraged partnership for various reasons, of liability and unwieldiness of partnerships, and suggested that we have a conference with Henry Howard, who I have used as Tax Attorney for a number of years.

We did have such a meeting in my office, and I do not know the date, and I looked through my file and can't find it, but presumably it was early in May some time, and at that time we went over Mr. Rooney's business affairs, his financial affairs, and decided it probably would be a good idea for him to incorporate this business and eventually go into some gift program of stock to his sons.

As I remember, the corporation—Mr. Howard went ahead and formed the corporation, got the

(Testimony of Wendell Watts.)

charter, which was in the latter part of May, May 27th, is that right?

Q. That has been stipulated to?

A. Yes.

The date. Then, of course, the next step was to make a list of the assets and liabilities and so forth of the corporation to be transferred. I made up such a list and at that time—I guess it was at that time that I suddenly realized Mr. Rooney had been operating for seven months or six months with no income. The nature of the hop crop is all the income comes in one period. When I turned over the list of assets and liabilities to be exchanged for stock in the corporation I asked Mr. Howard the feasibility of closing this sole proprietorship and making such transfer as of July 31st and using [45] the expenses for that seven months period to carry back in prior years when Mr. Rooney had rather high income, high income taxes.

Q. Mr. Watts, what was the date, to the best of your recollection, upon which this possibility first occurred?

A. Well, it must have been some time during the middle of July, because—I can't give you the exact date, but when I wrote that letter to Mr. Howard it was in July some time, and that is presumably when I first got the idea.

Mr. Smail: If your Honor please, if we are testifying about a letter, may we have it in evidence?

The Court: Is the letter available?

(Testimony of Wendell Watts.)

Mr. Smith: The letter is in our files, your Honor. We will find it, your Honor.

Q. Will you then proceed, Mr. Watts, what transpired after your letter of July 19th to Mr. Howard with respect to an operating loss?

A. Well, I am still relying on memory that goes back five or six years.

Mr. Smail: Could we have the letter in evidence here?

A. Well, of course, the letter, my memory——

Mr. Smail: I would object to your memory.

Mr. Smith: Counsel, the question now is what transpired after the writing of this letter. The question is what transpired after the date of this letter.

(Mr. Smith produced the letter.) [46]

The Court: The letter dated July 19th from Watts and Gibson to Henry Howard, 111 Sutter Street, San Francisco, will be marked Plaintiff's Exhibit 2.

Mr. Smail: We have no objection to it going in evidence.

(Document referred to was marked Plaintiff's Exhibit No. 2 in evidence.)

PLAINTIFFS' EXHIBIT No. 2

Watts and Gibson
Certified Public Accountants
2115 J Street
Sacramento 16, California

July 19, 1954.

(Testimony of Wendell Watts.)

Wendell E. Watts,
George T. Gibson.
Mr. Henry Howard,
111 Sutter Street,
San Francisco, California.

Dear Henry:

I have just returned from a month's trip back to the deserts of the East and received your letter regarding Frances Rooney. I was positive that I had sent you all the information except the appraisals when I returned the corporation papers, but if I did I can't find my copy. In any case here are the answers that you need:

1-A. F. L. Rooney was borned in Sacramento, July 19, 1894. He attended Sacramento schools, served in the first World War and was an automobile salesman for the Universal Motor Company, Sacramento, from 1919 to 1940. He was an automobile salesman for Ellsworth Harrold Company in Sacramento from 1940 to 1942. Since 1942 he has been a hop grower.

1-B. Wendell E. Watts was borned in Ohio, January 25, 1916. AB degree from Wittenberg College in 1938. Accountant for General Electric Company from 1938 to 1942. FBI agent 1942 to 1946. Public Accountant 1946 until present.

2. Suggested officers: F. L. Rooney, President; Frances L. Rooney, Jr., Vice-president; Bernard

(Testimony of Wendell Watts.)

Rooney, Vice-president; Mrs. Irene G. Rooney, Secretary-Treasurer.

3. The American Trust, Main Office, Sacramento, will act as depository.

4. I have already sent you the appraisals. In addition to the assets listed approximately $10,000.00 will be taken over by the corporation. There will also be a liability of at least $24,000.00 for advances on this year's hop crop.

5. The lease runs from September, 1952, until September, 1957. There is no option provision. It is a cash rental lease for bare land. The lease agreement is between the Estate of William J. Sheldon, the lessee, and Frances L. Rooney, the lessor. The lease provides for a yearly cash rent of $6,282.00 payable semi-annually. If you need further information on this let me know.

It seems to me it would be desirable to turn over the assets to F. L. Rooney, Inc., as of July 31st. A short period return could be made for the corporation from the time of the incorporation until July 31st, and then run the corporation on a fiscal year ending July 31st. By doing this the first seven months' expenses would be on Mr. Rooney's return without any income and the operating loss less his salary for the last five months could be carried back to the 1953 calendar year and some of the tax for that year could be recovered. In addition there would be no tax due for the corporation until Oc-

(Testimony of Wendell Watts.)

tober 15, 1955. Will you please consider this and see if you can see any difficulty in my reasoning?

In regard to the William Stock Farming Company, I would suggest that you send me your bill and I will forward it on. They are very prompt and will take care of this bill as soon as it is received.

Very truly yours,

/s/ WENDELL E. WATTS.

WEW/mdb

Received in evidence April 13, 1960.

Mr. Smail: But, of course, it is not evidence of what is stated in there but merely the evidence that the letter was written and was mailed by Mr. Watts to Mr. Howard. With that understanding it may go in.

Q. (By Mr. Smith): Then it is reflected by the letter, Mr. Watts, that you suggested in this communication that—perhaps I should read it for the record:

"It seems to me it would be desirable to turn over the assets"——

The Court: I don't think that is necessary. It may be considered read into the record and you may use such portions of it as you deem appropriate.

(Testimony of Wendell Watts.)

Mr. Smith: I am merely trying to refresh the recollection of the witness, your Honor.

The Court: Well, let him take a look at it.

(The letter was handed to the witness.)

Mr. Smith: Would you then like to restate the substance of your suggestion to Mr. Howard with respect to the net operating loss? [47]

Mr. Smail: If your Honor please, I think this letter speaks for itself rather than have him testify to what he believes the letter says.

Mr. Smith: Well, fine, Counsel. All I want to do is follow through on this, and determine——

The Court: Let's proceed.

Mr. Smith: ——what response was given then to your letter?

A. Well, Mr. Howard agreed that was probably the thing to do and that is what we did do, as the record shows, did turn over the assets and started operating as a corporation as of August 1st.

Mr. Smail: If I may, I am sorry to interrupt, but the testimony concerning the turning over of the assets is not responsive. It is not quite adequate for this witness to testify that the assets were turned over when there are no documents whatsoever indicating the assets had been turned over.

Mr. Smith: Your Honor, it is my impression that the objection that an answer is not responsive lies in the——

The Court: Well, I am going to let the answer stand, and you may cross-examine.

(Testimony of Wendell Watts.)

Mr. Smail: Thank you, sir.

Q. (By Mr. Smith): Mr. Watts, did you formally close the books of this individual operation by Mr. and Mrs. Rooney on July 31, 1954, or on or about that date? [48]

A. They were closed as of that date, yes.

Q. As of that date. The books of the corporation and of Mr. Rooney, Mr. and Mrs. Rooney individually, reflect completely that the transfer was effected on July 31, 1954, is that correct?

A. That is right.

Q. And the final question, after the decision had been made to effect a transfer on July 31, 1954, but not until after that decision had been made did you then communicate it to Mr. Rooney? If that question was not clear let me put it this way:

After you and Mr. Howard had reached a decision as to the effective date of the transfer, did you have occasion to tell Mr. Rooney about that decision and the results generated by it?

A. Well, I am sure that I didn't tell Mr. Rooney until such time as after I had heard the response from Mr. Howard on the letter that I had written, because I wanted to get a legal opinion on it before I went further with it.

Mr. Smith: Fine. I have no further questions.

(Testimony of Wendell Watts.)

Cross-Examination

By Mr. Smail:

Q. I forgot to ask Mr. Rooney a question; maybe you can help me with it, Mr. Watts: Do you know what time they harvested the hops in 1954, Mr. Rooney?

A. Well, the hops are harvested about the same time every year. They start about August 15th, approximately.

Q. And about what time do they finish? [49]

A. They run for about two weeks before they are harvested and put in the dryer.

Q. Thank you, sir.

The Court: What do you mean, Mr. Watts, hops are harvested the same time every year?

A. Well, it is within a few days, they start harvesting hops the same.

Q. Do you mean Mr. Rooney, or do you mean people generally?

A. I mean the people generally in the Cosumnes Valley and the American River Valley in this particular area, the crop harvest is the same within a few days year after year.

Q. Well, it can run up to a month's difference, can't it? A. Not in this valley.

Q. (By Mr. Smail): Are you Mr. Rooney's—if I may interrupt maybe I can clarify it this way—are you Mr. Rooney's accountant?

A. That is right.

(Testimony of Wendell Watts.)

Q. Then you would have familiarity as to when he was harvesting and paying bills?

A. That is right.

Q. And it is your testimony here that he would have been harvesting his crops from about mid-August, give or take a week, to about the first of September in the year 1954?

A. That is right.

Mr. Smail: Do you think that satisfies, your Honor? I didn't [50] mean to interrupt here, but I thought maybe if we established that he knew Mr. Rooney's operations——

The Court: I am not worried about the record in this matter here, but from my observation of the thing I don't think Mr. Watts is completely correct in saying that it is only a matter of a few days difference each year.

Mr. Smail: But in the year 1954——

The Court: It depends on what a "few days" means.

Q. (By Mr. Smail): In the year 1954 you have some recollection that Mr. Rooney's harvest fell within your description, namely, from about mid-August to about the first of September?

A. I am sure of that.

Q. Thank you, sir. Now, despite your testimony as to the time of the transfer of the assets you testified to on the books of both the proprietorship and the corporation as of July 31, 1954, which is a stipulated fact, do you know of the existence or did you have any documents which might have

(Testimony of Wendell Watts.)

transferred these assets, namely, bills of sale, a transfer of the lease, the hops themselves, the vines?

A. I had nothing to do with that at all.

Mr. Smail: No further questions.

Mr. Smith: No further questions. Call Mr. Henry W. Howard.

(Witness excused.) [51]

HENRY W. HOWARD

called as a witness for Plaintiffs, Sworn.

Mr. Smith: Your Honor, may Mr. Watts be excused?

The Court: Unless there is objection, he may.

Mr. Smith: Any objection, counsel?

Mr. Smail: None at all.

Direct Examination

By Mr. Smith:

Q. Mr. Howard, would you state your address and occupation for the record?

A. My name is Henry W. Howard, I am an attorney at law, practicing at 111 Sutter Street in San Francisco.

Q. You were consulted by Mr. Francis Rooney in the Spring of 1954? A. I was.

Q. Would you relate the substance of your conversations with Mr. Rooney, Mr. Howard?

A. I am going to relate it briefly, because your Honor has heard these facts from other witnesses.

Mr. Rooney and Mr. Watts consulted with me,

(Testimony of Henry W. Howard.)

and at the time of our first conversation Mr. Rooney was in the mind to form a partnership with his sons. I advised him that in my opinion over-all he would be better off if his business were transferred to a corporation.

We computed at the time that the over-all income tax burden would be substantially less under a corporate form of operation than it was as an individual proprietorship at his [52] level of income.

I suggested to him that the corporate form of business would be a more economic method of accumulating surpluses for the purposes—I recall he mentioned at that time the ultimate purchase of land. And I also discussed with Mr. Rooney, we discussed at some length, the distribution of his estate among his children, with the idea of reducing the ultimate impact of death tax.

In that connection I pointed out to him that it would be much more feasible to make that distribution through the means of stock in the operating company than it would be to transfer an undivided interest in the property.

Mr. Rooney concurred in my suggestion, and on the 27th of May the articles of incorporation were filed.

Prior to that time I embarked upon the usual routine of organizing the corporation and transferring the assets to it. As I recall, I wrote Mr. Watts on the 14th of May asking for all the various details relating to the corporation and the transfer of the property, such as an analysis of the assets

(Testimony of Henry W. Howard.)

and their cost, and who were to be the officers and directors and who was to have the bank account and so on.

The reply of Mr. Watts to me is in evidence here. As I recall at the time he was away in the east for more than a month after I wrote him, I think, in the middle of May.

When I had the information I immediately prepared the [53] application for a permit to issue stock, and my recollection is that was filed with the Corporation Commissioner about the end of July. I think it was forwarded to Mr. Rooney for the purposes of signature about that time.

In connection with that application we prepared minutes of the corporation authorizing the filing of the application and acquisition of the assets in exchange for stock. Then I instructed Mr. Watts to memorialize the same on the records of the individual and the corporation.

Q. The decision as to the effective date of the transfer of these assets, Mr. Howard, was one reached between you and Mr. Watts, is that correct?

A. Yes, after Mr. Watts wrote me on the 19th of July, I recall discussing the matter with him on the phone at some length, and I concurred in his suggestion.

Q. Prior to that suggestion you were merely waiting the fulfillment of the normal mechanics of filing the application and getting the necessary supporting documents?

(Testimony of Henry W. Howard.)

A. We were going through the usual routine of making the transfer.

Q. Mr. Howard, in your opinion, would it have been sensible for you to implement Mr. Rooney's program by forming a corporation on May 27th, and then allowing that corporation to remain dormant without any transfer of the assets of the individual business to it until the end of the calendar year [54] 1954?

A. I did not contemplate doing that. I contemplated carrying out the program suggested to him as rapidly as I could.

Q. Now, with respect to the documents of the transfer and the actual transfer of the assets of the individual business to the corporation, would you relate to us what steps were taken to effect that or what your recollection is?

Mr. Smail: If your Honor please, I am going to probably have some objection here if we are talking about documents transferring the assets. I respect Mr. Howard's testimony here and I would like to hear as much of it as I possibly can, but this date of transfer of assets is one of importance, to me, and if it comes right down to getting close on dates I would like to see the documents.

The Court: Perhaps you can cross-examine him on that, Mr. Smail, and ask him what he can produce.

Mr. Smail: All right, sir.

A. I don't have a definite recollection, Mr. Smith, of direct participation in the transfer except

(Testimony of Henry W. Howard.)

the preparation of the corporate documents, the application to the corporation Commissioner set forth specifically the assets to be transferred, the date as of which they were to be transferred and the appraisals required by the Commissioner in that connection. I am familiar with that. I am also familiar with the fact that I believe very shortly thereafter the bank accounts were [55] transferred to the name of the corporation.

I did not participate in the transfer of other assets. I knew there was no real property involved, so we did not have the usual problem of preparing deeds and recording them.

In these situations, I am frank to say, that not very often is the transfer of personal property and equipment of this kind memorialized in assignments or bills of sale unless there are creditors' rights, or something of that nature involved.

Mr. Smith: You may cross-examine.

Cross-Examination

By Mr. Smail:

Q. You gave us a couple of things, you mentioned you were familiar with the appraisal, the list of assets, and the transfer of the bank accounts. The thing I am principally interested in is the transfer of these hops and trellises upon which the hops were located. Do you know about the transfer of those?

A. I have no personal knowledge as to whether or not that was done by any document.

(Testimony of Henry W. Howard.)

Q. What about your knowledge about this list of assets other than the hops or trellises? Maybe you can enlighten both me and the Court about this transfer, if any?

A. Well, as I say, we contemplated the transfer to the corporation of all the operating assets of the sole proprietorship. [56]

Q. Contemplated?

A. Yes, and that was to be done in consideration of stock, so in that connection, in connection with the application for permit to issue stock, as I recall, we furnished the corporation Commissioner with a list of the assets which would be transferred as of July 31st——

Q. That is the proposed transfer, is that correct, the proposed transfer? You furnished that list to the Commissioner?

A. Yes; I think that was——

Q. And then on August 24th the Commissioner said you can issue stock? That is a stipulated fact here, I believe.

A. He issued a permit to issue stock as of that date.

Q. In 1954. And then would it be——

A. As of July 31.

Q. Yes, as of. Would it then be your testimony that these assets were in fact transferred after you received notification that the assets could, in fact, be transferred for stock? I assume you would have to have the stock before you could exchange the stock for the assets?

(Testimony of Henry W. Howard.)

A. Well, the normal practice in California is to transfer the assets upon the receipt of the permit as of the date authorized by the Commissioner. That has created a common problem, as you know, because——

Q. Well, would it be your testimony then that the actual transfer of the assets was necessary after the corporation [57] received permission to issue stock on August 24, 1954?

A. Well, no; I view it as merely a ratification by the corporation Commissioner.

Q. If I might interrupt you, you stated you had no recollection of the actual transfer of these assets. You are really talking about ratification of nothing, aren't you?

A. In the sense that there was no bill of sale to the personal property——

Q. Well, as a lawyer, how do you transfer these assets? A. Well, as I say——

Q. I am mostly interested in these hops and trellises.

The Court: I think you are interrupting Mr. Howard. Let him finish his answers.

A. As a lawyer, I would say that when you instruct your client to close his books and when you file an application on his authority with the Corporation Commissioner to transfer personal property to a corporation, and when the Corporation Commissioner ratifies that transfer that that is sufficient to effect an actual transfer of the property, and I don't know who could complain about it. I

(Testimony of Henry W. Howard.)

don't think as a legal proposition that anything further is required.

Q. Are you through? A. Yes.

Q. But when you are talking about these assets you are talking about assets other than the hops and trellises, which you said [58] you had no recollection of, is that correct?

A. Well, in my own contemplation at the time I viewed them all the same way. In other words, we took a description of all the assets and we went through the motions of transferring them to the corporation. As I recall, and this would be routine, the minutes of the corporation reflect the transfer and reflect the authority in the corporation to receive the transfer and to issue its stock accordingly as of a certain date.

Q. Even though the minutes—excuse me, are you through?

A. And in the normal case the burdens and benefits of ownership are picked up and reflected as of the date set forth in the permit of the Corporation Commissioner.

Q. Are the minutes here? A. No.

Q. Is it your recollection of the minutes, if we may proceed this way, then, that there is nothing in there that actually says there is a transfer, however, when you got the power to issue the stock for the assets?

A. Well, the Corporation Commissioner would require you to furnish a resolution of the Board of Directors authorizing the acquisition of these

(Testimony of Henry W. Howard.)

assets as of a specific date in exchange for stock, at certain values, and so on and so forth.

Q. And the Corporation Commissioner said that was all right on August 24th?

A. That is correct.

Q. And you were notified by mail, then, were you, in a day or [59] two, subsequently?

A. The time in the Corporation Commissioner's office in my experience can be anywhere from three weeks to four or five months.

Q. In other words, you wouldn't have heard about it until September, probably, then?

A. Well, I heard about this—when the permit is mailed I would get it the next day. It bears on its face it was mailed on August 24th, as I recall. I am merely saying that you can't hold up these things until the Corporation Commissioner actually issues a permit, because you would just never get into operation. And the problem that has arisen is not only a practical matter, but it is a problem of Federal Tax Law, because you make a transfer to the Corporation and then you may not get a permit for 60 days, and so on, and then the question arises as to whether there was or was not a tax free exchange as of the date specified for the transfer of the assets.

Q. I am sure you appreciate as a tax attorney that this case couldn't even be before his Honor if those assets were not transferred until that crop was picked, the taxpayer on an accrual basis, he would necessarily have to have all the income at-

(Testimony of Henry W. Howard.)

tributable to him unless those assets were in fact transferred before any harvesting of the crop, and the taxpayer, it is a stipulated fact, is on an accrual basis.

It is a critical factor here to find out how long he owned [60] those assets. As you know, I needn't tell you, as a tax attorney, and his client, that that is a fact here, he didn't in fact transfer those assets until that crop was harvested in that year there would be no point of the Commissioner reallocating income, because it would all be his as a matter of law.

A. Well, of course, this is the first time that the Internal Revenue Service or the Government at any level in this proceeding has questioned the fact, or raised the issue. The income tax returns were filed and accepted on that basis, and——

Q. It may be the first time it has been discussed with you, but it is a very important question here?

A. As a matter of procedure in transferring an operating business, involving essentially personal property, the transaction here was carried out normally and in a way that would normally effect the transfer of assets, in my opinion.

Q. Maybe I can make two concluding questions. In the first place, you have no recollection of transferring either the leasehold or the growing hops, and trellises, which I assume would be real property, and recording that transfer? A. No.

Q. And secondly——

A. I told Mr. Rooney, and discussed with Mr.

(Testimony of Henry W. Howard.)

Watts the manner of informing his landlord and also the Steiner Company with respect to the fact that the business had been transferred to [61] the corporation.

Mr. Smail: May I ask for a stipulation, to avoid calling a witness—I believe there will be no question about it at this time, and if so I would have no further questions. I wonder if Counsel would stipulate with me that Mrs. Helen Jones of the County of Sacramento in the Assessor's office, if called as a witness, would testify that she is in charge of the assessment list or cards on improvements on leased lands and improvements on leased land in the ranch here in question are still in the name on her rolls of Mr. Rooney as an individual and not in the name of the corporation? Would that be agreeable?

Mr. Smith: That would be agreeable.

Mr. Smail: I have verified that this morning. I have no further questions.

Mr. Smith: That is all. We have no further witnesses.

The Court: Plaintiff rests?

Mr. Smith: Plaintiff rests.

Mr. Smail: The United States would like to argue whether a prima facie case has been established here rather seriously. I have no witnesses to call. I think we might be able to argue it just as well in briefs and not take more of the Court's time.

The Court: I was going to say why don't you

make it in the form of a motion and I will take it under advisement, and [62] then you can proceed.

Mr. Smail: I might just take less than two minutes.

The Court: Well, I don't want any argument on it, just state your motion so that you will have your record preserved in that regard.

Mr. Smail: It will be on two grounds: On the first ground we discussed earlier, namely the only question before the Court was the legal power of the Commissioner to reallocate income, and none of this testimony has dealt with that issue, and if that issue is not the one before the Court and we are to consider whether the Commissioner acted arbitrarily or capriciously or unreasonably in reallocating his income, I submit the evidence before your Honor has not made an attack on the Commissioner's allegation here.

It is clear that the crop was harvested in '54, and yet as reported in the two controlled businesses resulted in a loss that wiped out the '54 income of the individual and knocked out almost $20,000 of the tax paid in 1953, and $2,000 of the tax paid in 1952. Not only distorting the income for this year, but for the two prior years.

I would submit that no prima facie case has been established that the Commisioner acted unreasonably in allocating this income.

The Court: I will take that under advisement.

Mr. Smail: The United States, after making this motion, [63] will not call any witnesses, and will rest on that.

The Court: The defense rests.

Mr. Smith: If your Honor please, I wonder if the Plaintiff might recall Mr. Howard for the purpose of placing the construction which he intended on the pleadings which he drafted in this case, as Counsel has raised the issue of the proper interpretation of the language employed in the pleadings in this case, that is, the question of without power or without authority, and if we might put Mr. Howard on for that purpose?

Mr. Smail: We don't think the testimony can be introduced.

The Court: I don't think that that is a subject of testimony. I think that, unfortunately, is what I have got to resolve. I wish I could place the responsibility on Mr. Howard's shoulders, but I am afraid the Government probably would not accept that.

Mr. Smith: We felt that it would be illuminating to your Honor, and we would like to introduce it at this time.

The Clerk: Is this a motion for dismissal, or for judgment?

The Court: He has made a motion, I assume, for judgment on the basis that there is no prima facie case shown.

Mr. Smail: Yes. I don't think that there is any evidence here at all, establishing a prima facie case.

The Court: Well, if you think it is desirable, Mr. Smith, [64] to make a record on that, you may do so, but I don't think that I could accept an

attorney's opinion as to what a document means, even though——

Mr. Smith: Not as a legal conclusion, your Honor, but just as the expression of the writer as to that which was in his mind.

The Court: I don't think that that is sufficient though. It is what the document would convey to the average person or to an ordinary person reading it, which is to be controlling, rather than what the person intended.

Mr. Smith: I must agree, your Honor.

The Court: All right. Now, as I have already indicated, I want memos in this matter here. I don't know how one judge can be as lucky as I am, whenever there is something that hasn't been decided in this Circuit it always seems to drift into my Court here.

I assume the burden is on the Plaintiff, so, Mr. Smith, how long do you want for your opening memorandum?

I would suggest to you gentlemen, that you have this record transcribed here this morning, and make it a part of the record in the case, and have everything in black and white.

Mr. Smith: Yes, your Honor.

Mr. Smail: Yes.

The Court: Is that agreeable? [65]

Mr. Smith: Yes, your Honor.

Mr. Smail: Yes, your Honor.

(Discussion between Court and Counsel as to time of filing memorandum.)

(It was ordered that the memorandums be filed 30, 30 and 15, the time to commence upon the date of the filing of the transcript with the Clerk of the Court.)

[Endorsed]: Filed May 3, 1960. [66]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD OF APPEAL

I, James P. Welsh, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the appellant herein.

Complete Documents, numbered one (1) through and including twenty-four, (24) and Exhibits one (1) and two (2).

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 13th day of February, 1961.

[Seal] JAMES P. WELSH,
Clerk;

By /s/ WILLIAM C. ROBB,
Deputy in Charge.

[Endorsed]: No. 17313. United States Court of Appeals for the Ninth Circuit. Francis L. Rooney, and Irene Rooney, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed Feb. 14, 1961.

Docketed March 29, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 17313

FRANCIS L. ROONEY and IRENE ROONEY, His Wife,

Plaintiffs and Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant and Appellee.

APPELLANTS' STATEMENT OF POINTS

To the Clerk of the Above-Entitled Court:

Those portions of the record in the above-entitled proceeding designated by appellants for inclusion in the record on appeal contain all contentions and evidence relevant to the following points which are to be considered on the appeal on this cause:

The District Court erred in its determinations that:

(1) The action of the Commissioner of Internal Revenue in allocating expenses actually incurred by appellants to their successor corporation was a proper exercise of the discretion vested in him by Section 482 of the Internal Revenue Code of 1954;

(2) Appellants were not entitled to deduct the expenses incurred by them individually in connection with the growing of the crop in question and to carry back their net operating loss as permitted by applicable provisions of the Internal Revenue Code of 1939;

(3) Appellants did not qualify for the tax free transfer provisions of Section 351 of the Internal Revenue Code of 1954.

Dated: March 28, 1961.

Respectfully submitted,

/s/ N. RICHARD SMITH,

HOWARD & PRIM,
Attorneys for Appellants.

[Endorsed]: Filed March 29, 1961.

No. 17314

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

M&R Investment Company, Inc., d/b/a Dunes Hotel and Casino, and Fred Miller, Don Rich, Marvin Cole, Harry Riggs, Grimley Engineering, Inc., d/b/a Trans-Global Airlines, and Catalina Air Transport d/b/a Catalina Airlines,

Petitioners,

vs.

Civil Aeronautics Board,

Respondent.

On Petition for Review of an Order of the Civil Aeronautics Board of the United States of America.

BRIEF FOR PETITIONERS.

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Parker & Son, Inc., Law Printers, Los Angeles. Phone MU. 6-9171.

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TABLE OF AUTHORITIES CITED

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

M&R Investment Company, Inc., d/b/a Dunes Hotel and Casino, and Fred Miller, Don Rich, Marvin Cole, Harry Riggs, Grimley Engineering, Inc., d/b/a Trans-Global Airlines, and Catalina Air Transport d/b/a Catalina Airlines,

Petitioners,

vs.

Civil Aeronautics Board,

Respondent.

On Petition for Review of an Order of the Civil Aeronautics Board of the United States of America.

BRIEF FOR PETITIONERS.

Jurisdictional Statement.

Petitioners have filed a Petition for Review of an order of Respondent, the Civil Aeronautics Board[1] issued at the conclusion of the administrative proceeding below.[2]

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[1]Opinion and Order No. E-16331, decided February 1, 1961 [Tr. 78-87]. The Board denied a Petition for Rehearing [Tr. 88-93] on March 22, 1961 and stayed temporarily the effectiveness of its prior order (Board Order No. E-16541, dated March 22, 1961 [Tr. 106-108].

[2]*Entitled M&R Investment Co., Inc. et al., Enforcement Proceeding,* Docket No. 10606. Petitioners M&R and Catalina and Trans-Global were respondent in the administrative proceeding. Petitioners Donald Rich and Fred Miller were not respondents in the administrative proceeding.

The Bureau of Enforcement,[3] the prosecuting section of the Board, filed a complaint against the respondents asserting that they were violating the Federal Aviation Act of 1958 (49 U. S. C. Sec. 1301 *et seq*) by engaging in "air transportation" in violation of 49 U. S. C. Section 1371(a).

This court is given jurisdiction to review this order by 49 U. S. C. Section 1486(a).

All of the petitioners reside or have their principal places of business within this Judicial Circuit. Venue is fixed by 49 U. S. C. Section 1486(b) which provides that the petition shall be filed in the Circuit where the petitioner resides or has his principal place of business. Venue is properly laid before this court.

Statutes Involved.

The principal statute involved is the Federal Aviation Act of 1958, 72 Stats. 737-806, 49 U. S. C. A. Section 1301-1542.

49 U. S. C. Section 1301 . . . Definitions.

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other

[3]Formerly called the Office of Compliance.

State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or party by aircraft and partly by other forms of transportation.

49 U. S. C. Section 1371 . . . Certificate of public convenience and necessity—Essentiality

(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

49 U. S. C. Section 1486 . . . Judicial review—Orders subject to review; petition for review

(a) Any order, affirmative or negative, issued by the Board of Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of

Columbia upon petition, filed within sixty days after the entry of such order, by any persons disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Section 1486 . . . Venue

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

The cited section of the Administrative Procedure Act (5 U. S. C. Sec. 1001, *et seq.*)

5 U. S. C. Section 1009 . . . Judicial review of agency action.

Except so far as (1) statutes preclude judicial review of (2) agency action is by law committed to agency discretion.

* * *

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3)

in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Statement of the Case.

The Bureau of Enforcement filed a complaint against the administrative respondents on June 15, 1959 [Tr. 2-6] alleging that the respondents were engaging in "air transportation" in violation of "Section 401 of the Federal Aviation Act of 1958" (49 U. S. C. Sec. 1371) by holding out and selling the "Dunes Tours" to the general public and providing air transportation between the Los Angeles, California area and Las Vegas, Nevada to the patrons of these tours [Tr. 2].

The persons named as respondents in the complaint consisted of the following:

1. Petitioner M&R Investment Co., Inc. d/b/a Dunes Hotel Las Vegas, Nevada. It was alleged that M&R operated as "an indirect air carrier" by holding out and selling the "Dunes Tours" to the general public, and providing air transportation to the tour patrons through aircraft leased from petitioners Trans-Global Airlines and Catalina Air Transport [Tr. 2].

2. Petitioner Catalina Air Transport d/b/a Catalina Airlines. It was alleged that Catalina engaged in air transportation by operating the flights between Las Vegas and Los Angeles carrying the tour patrons, in violation of Section 401(a) of the Act. (49 U. S. C. Sec. 1371(a)) [Tr. 3].

3. Fred Miller, Don Rich, Marvin Cole, Harry Riggs and Grimley Engineering Company d/b/a Golden State Airlines also d/b/a Trans-Global Airlines. It was alleged that these respondents were engaging in air transportation by operating the flights between Las Vegas and Los Angeles carrying the tour patrons in violation of Section 401(a) of the Act. During the course of the hearing, the petitioner Trans-Global Airlines, Inc., a corporation, was substituted as a respondent in the administrative proceeding for the above named individuals and companies [Tr. 163].

Petitioners, Fred Miller and Don Rich were removed as individual respondents in the administrative proceeding when Trans-Global Airlines, Inc., a corporation, was substituted for them. Nevertheless the Board held that petitioners, Rich and Miller, should be enjoined, along with the other respondents, because they were principals of petitioner, Trans-Global Airlines, Inc., and partners in the C-46 Company which owned two of the aircraft employed in operating the Dunes flights. The Board found that "operations may be resumed under some other name unless these persons are individually enjoined from engaging in air transportation" . . . [Tr. 52].[4]

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[4]The finding was taken from the Examiner's Initial Decision. The Board adopted as its own, the Examiner's findings and conclusions [Tr. 80].

The respondents filed answers denying the charges in the complaint and presenting affirmative defenses [Tr. 15-19, 109-113]. After public hearings were held and briefs had been submitted by the parties, the Hearing Examiner issued an Initial Decision holding that the respondents had violated the Act as charged, and enjoining the respondents and petitioners Rich and Miller from engaging in air transportation, in violation of 49 U. S. C. Section 1371(a). The Board adopted the Examiner's findings and conclusions as its own [Tr. 80]. The Board's injunction against engaging directly or indirectly in air transportation was directed against M& R Catalina, Trans-Global and Fred Miller and Donald Rich, individually, and as principals in Trans-Global Airlines, Inc. [Tr. 87]. This order is before this court for review.[5]

A brief description of the flight operations of the petitioners is as follows:

The Dunes Hotel is a resort hotel, located in Las Vegas, Nevada, approximately 289 road miles and 228 air miles from Los Angeles, California.[6] The Dunes' flights were offered in Los Angeles, California, free of charge, to guests of the Dunes Hotel who desired air transportation in connection with their stay at the Dunes Hotel in Las Vegas, Nevada. The evidence of record shows that all of the patrons of the Dunes flights were guests of the Dunes Hotel, and that they fell into the following categories:

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[5]The Board's order was stayed by this court on February 13, 1962 until the Board's order in *Las Vegas Hacienda Inc. v. C. A. B.*, No. 17081 shall become final and effective.

[6]The Board was requested to take official notice of these distances.

(a) Overnight guests who had confirmed, prepaid room reservations at the Dunes Hotel, Las Vegas, Nevada for the duration of their stay in Las Vegas [Tr. 233, 260]. Overnight guests were not required to purchase the Magic Carpet Tour or any part thereof, so long as their confirmed room reservations had been paid in full prior to boarding the flight [Tr. 235-236, 256-257].

(b) Evening tour guests who had purchased the Dunes tour. Since these persons did not remain overnight in Las Vegas, intensive screening process was employed by the Dunes and its agents to insure that no one was permitted to purchase an evening tour other than Dunes Hotel guests [Tr. 233-240, 255-261].

(c) Particular guests of the Dunes Hotel selected by the management who paid nothing for the tour or other hotel service and accommodations, and groups of guests attending conventions or parties at the Dunes Hotel. The record shows that these persons were guests of the Dunes Hotel in all instances [Tr. 212-213].

Patrons of the Dunes Tour received the following benefits:

1. Free air transportation from Burbank or Los Angeles to Las Vegas.
2. Champagne enroute from Los Angeles to Las Vegas.
3. Limousine service from the Las Vegas Airport to the Dunes Hotel.
4. One Sinbad Lounge cocktail.
5. Arabian Room show reservation and cocktail.
6. One bottle of Dunes Gold Label Champagne.

7. Limousine service from the Dunes Hotel to the Las Vegas Airport.

8. Free air transportation from Las Vegas to Burbank, or Los Angeles.

The Dunes Tour services were sold to guests of the Dunes Hotel for $29.95[7] [Tr. 232].

Each of the items listed above, other than the Dunes flights, were sold at the prevailing retail price for the article or service at the Dunes Hotel, or, in the case of the limousine service, at the rate charged the public by the Tanner Bus Line, the operator of the limousine [Tr. 365-366]. The total of these charges exceeded the price of $29.95.

A Tour booklet was received by each patron of the Tour [Tr. 367]. The booklet contains eight coupons, one for each of the services and benefits referred to above, with the exception of the champagne enroute.[8]

The Dunes had entered into contractual arrangements with both Trans-Global and Catalina Air Transport to perform the actual physical operation of the Dunes flights. With the exception of the Catalina employees who performed certain limited functions at the Los Angeles International Airport, the activities of Trans-Global and Catalina were limited to the physical performance of the Magic Carpet Flight [Tr. 9, 55-56, 194-197, 199-202].

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[7]The price was reduced to $19.95 on Sunday through Thursdays as a special inducement for guests of the Dunes Hotel to use the facilities of the hotel and to take the tour during the week when the facilities of the Dunes were not so crowded.

[8]No coupon was required to obtain the champagne enroute; liberal amounts of champagne were served the Tour guests [Tr. 172].

At the outset of the hearing, the petitioners moved to strike paragraphs 6 and 8 of the complaint, insofar as violations of the Federal Aviation Act of 1958 (49 U. S. C. Sec. 1301 *et seq.*) occurring prior to January 1, 1959 were alleged, on the ground that the sections of the Act that respondents were accused of violating, had not gone into effect until January 1, 1959 [Tr. 117-119]. This motion was denied by the Examiner, and voluminous evidence of pre-1959 violations were received in evidence over petitioners' continuous objection [Tr. 121-162]. This evidence was considered and relied on by the Board in reaching its findings, conclusions and decision [Tr. 31, 37].

The Board's final order in this case was in the form of an injunction against all petitioners, from engaging either directly or indirectly in air transportation, as that term was defined in 49 U. S. C. Section 1301-(10)(21), in violation of 49 U. S. C. Section 1371-(a). Petitioners' objected to the form of this order on the ground that it was too broad, and indefinite particularly as it applied to petitioners Trans-Global, Catalina, Rich and Miller who engaged in other aviation activities and flight operations.

Petitioners also objected to the inclusion of petitioners Rich and Miller in the injunction because they were not included as respondents in the administrative proceeding at the time the order was issued, and because there was no evidence of record to support the finding that there was "the likelihood that operations may be resumed under some other name unless these persons are individually enjoined. . . ." [Tr. 52].

Specification of Errors.

1. The Board erred in issuing the order on review without substantial evidence in the record to support it.

2. The Board erred in concluding that the petitioners were engaged in interstate air transportation as common carriers for compensation or hire.

3. The Board erred in admitting in evidence and relying upon evidence of petitioners activities prior to January 1, 1959.

4. The Board's injunction against petitioners to cease and desist from engaging in air transportation is too vague, indefinite and ambiguous.

5. The Board erred in including petitioners Rich and Miller within the scope of its injunction, because these petitioners were not respondents in the administrative proceeding, and there is no evidence to support the issuance of an injunction against them.

Summary of Argument.

The Dunes Tours did not constitute "air transportation" because the holding out and the privilege of taking the Dunes' Tour flights were restricted to hotel guests in Los Angeles, California. The Board improperly found that petitioners had violated Section 401-(a) of the Federal Aviation Act of 1958 on the basis of petitioners' activities which occurred prior to the effective date of this section. Absent this evidence, the Board's order is not supported by substantial evidence.

The inclusion of the individual petitioners in the Board's injunction was without legal or factual basis. The individuals were not respondents in the adminis-

trative proceeding, the corporate petitioners, Trans-Global Airlines Inc., was not their *alter ego,* and there is no evidentiary basis for the finding that the tour operations may be resumed if these petitioners are not enjoined, individually.

The Board's injunction, which is couched in the language of the statute, is too broad and indefinite. The Board's order should be limited to prohibition of the acts which the Board properly found violated the Act and those necessarily related thereto. The effect of the injunction on individuals and companies which engage in other aviation activities would be particularly onerous.

The Dunes Tour Flight Did Not Constitute Air Transportation.

Petitioners acknowledge that the tour flights involved in this proceeding resemble those in *Las Vegas Hacienda, Inc. v. C. A. B.,* 298 F. 2d 430 (C. A. 9, 1962).[9] Petitioners do not propose to belabor the legal issues raised and considered in that proceeding. Petitioners will point out the distinguishing factual features of the Dunes tours.

Persons requesting the Dunes tours were carefully screened by the Dunes' personnel to ensure that they were in fact guests of the Dunes Hotel, that they intended to stay at the Dunes Hotel. If they were overnight guests, or that they were planning to spend the evening at the Dunes Hotel if they were evening tour patrons [Tr. 233-240, 255-261].

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[9]This court held that the tour flights constituted "air transportation" and generally affirmed the Board's order. A petition for writ of certiorari is pending before the United States Supreme Court.

The newspaper advertising of the Dunes' tours featured the legend "For Guests of the Beautiful Dunes Hotel and Casino Only" or "Only for guests of the Beautiful Dunes Hotel and Casino" [Tr. 29, 202-204, 347-364].

Overnight patrons were required to pay for their rooms before they could obtain the Dunes Tours [Tr. 29, 217, 233, 260]. Tour patrons were required to sign an official hotel guest register before they were permitted to take the tour flight [Tr. 220-223, 370-371]. Through control of the passengers and their baggage at the Las Vegas Airport and at the Dunes Hotel, Dunes was assured that patrons went to and remained at the Dunes Hotel [Tr. 261-272]. Boarding passes for the return flight from Las Vegas to Los Angeles were issued only in the lobby of the Dunes Hotel [Tr. 267]. Most of the tour benefits were available only at the Dunes Hotel [Tr. 234-235].

The Dunes personnel were carefully instructed to accept only guests of the hotel on the tour flights [Tr. 239-240, 255-256]. The Dunes personnel questioned all callers to ensure that they were not seeking air transportation. The few callers who were seeking air transportation were denied permission to take the Dunes tour [Tr. 218-220, 236-237, 256-261].

A number of public witnesses testified as to their understanding that the tour flights were free and that they were available only to guests of the Dunes Hotel [Tr. 210-215, 249-253, 272-282]. Public witnesses testified that they were denied permission to take the tour flight [Tr. 29, 258-259, 272-276]. Testimony of virtually all of the public witnesses supported petitioners' contention that the flights were available only

to guests of the hotel. Petitioners established that all of the 57 persons who took the flight of January 10, 1960 were guests of the Dunes Hotel [Tr. 374]. Petitioners also established that during the year 1959, approximately 97% of the tour patrons enjoyed the buffet dinner and picked up the bottle of champagne at the Dunes Hotel, which are included in the tour benefits [Tr. 373].

It is apparent that the Dunes Hotel effectively limited patrons of its tours to its hotel guests. The Court should find that the petitioners so limited the tour patrons, and did not engage in air transportation in violation of Section 401(a) of the Federal Aviation Act of 1958, but instead engaged in private air transportation, which is not subject to regulation by the Board.

The Board's Order Is Not Supported by Substantial Evidence Because the Board Relied on Evidence of Violations Not Charged in the Complaint.

The charges against the administrative respondents are contained in the complaint filed by the Bureau of Enforcement [Tr. 2-6]. The complaint asserts violations of "Section 401(a) of the Federal Aviation Act of 1958" (49 U. S. C. Sec. 1371(a)) since April 24, 1958 [Par. 6, Tr. 3; Par. 8, Tr. 4]. This section of the Federal Aviation Act of 1958 did not become effective until January 1, 1959.[10] No other violations were charged in the complaint.

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[10]Public Law 85-726, August 23, 1958, Section 1505. This public law provided that Section 401(a) and other sections of the Federal Aviation Act of 1958, would become effective on the 60th day following the date on which the Administrator of the

Since the charges consisted in their entirety of violations of a statute which did not become effective until January 1, 1959, the Board could not properly receive evidence of activities prior to January 1, 1959, and could not properly consider such evidence in making its findings, conclusions and decisions. In fact, the Board did receive and consider such evidence, and relied heavily on the same in making its findings and conclusions and its decision in this case [Tr. 26-27, 31, 51, 53-54, 80].

The elaborate testimony of the Board investigators [Tr. 121-162] and the numerous exhibits sponsored by them [see, Exs. OCA 5A, 6-10, 12E, 12F, 19-21, 38, 40; Exs. OCB 1, 46, 72, 130-135] all are of events which occurred in 1958. The entire investigation by the Board of the activities of the respondents, took place in 1958. The respondents moved to exclude evidence of activities prior to the effective date of Section 401(a) of the Act [Tr. 117-118, 121-122]. The Examiner denied petitioners' several motions, and extensive evidence of Respondents' activities prior to January 1, 1959 was received in evidence [Tr. 31, 119].

The record in this proceeding would be drastically altered and diminished, if evidence of 1958 activities were excluded. Absent this evidence, the Board's order is not supported by substantial evidence, and this court is required to set it aside. (5 U. S. C. Sec. 1009(e)). In any event, the Board has considered and relied on voluminous evidence which should not have

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Federal Aviation Agency first appointed under this Act, qualified and took office. The first Administrator of the Federal Aviation Agency was appointed, qualified and took office on October 31, 1958. See, note 49 U. S. C. A. Transportation, Section 301 to end, 1961 Cumulative Annual Pocket Part, page 143.

been received in evidence. Since this evidence is so voluminous and extensive,[11] this court should set aside the Board's order or remand the proceeding to the Board with instructions to exclude all evidence of activities and events which occurred in 1958, and render its decision on the basis of the revised record.

The Injunction Against Petitioners Rich and Miller Is Invalid.

The Board has enjoined petitioners, Rich and Miller, ". . . individually, and as principals in Trans-Global Airlines, Inc. . . ." from engaging in air transportation in violation of 49 U. S. C. Section 1371(a). Petitioners, Rich and Miller, were not respondents in their individual capacities at the time the Board Order was entered [Tr. 163].

The purported basis for the inclusion of Rich and Miller in the Board injunction is contained in the Examiner's Initial Decision:

> "In view of the evidence here disclosing Messrs. Miller and Rich as principals in the operating carrier, Trans-Global, and as partners in the C-46 Company which owns two of the aircraft used in the operation, and the likelihood that operations may be resumed under some other name unless these persons are individually enjoined from engaging in air transportation . . ." [Tr. 52].

There is no evidentiary basis for the conclusion that a likelihood exists that operations may be resumed under some other name, unless petitioners Rich and Miller are individually enjoined, to be found within the

[11]Petitioners included only a representative portion of such evidence in their designation of record.

four corners of the record. It appears that the Examiner merely applied the rationale of *F. T. C. v. Standard Education Society,* 302 U. S. 112 (1937) to this case, despite the absence of any evidentiary basis to support this action.

The import of the *Standard Education Society* case, *supra,* is clarified in *P. J. Reynolds Tobacco Co. v. F. T. C.,* 192 F. 2d 535 (C. A. 7, 1951). In the *Standard Education Society* case, officials of the corporation were named individually in the complaint, the corporation was organized by the individuals for the purpose of evading any order which might be issued against the corporation, and the circumstances disclosed in the findings of the administrative agency and the testimony were such that further efforts on the part of the individual respondents to evade the administrative agency's order could be anticipated. The court also noted in the *Standard Education Society* case, *supra* that the individual respondents acted with practically the same freedom as though no corporation had existed (191 F. 2d 539). This is tantamount to a finding that the corporation was the *alter ego* of the individuals.

These crucial elements are absent in the instant case. Petitioners Rich and Miller were not charged in the complaint individually, Trans-Global was not their *alter ego,* they did not organize Trans-Global to avoid Board regulation, and there is no evidence that would support an inference that they would attempt to evade the Board's order issued in this case.

The evidence of record shows that petitioners, Rich and Miller, were the principals of Trans-Global Airlines, Inc., a corporation, and that Trans-Global and

Catalina performed the flight portion of the Dunes Tours [Tr. 26, 55-56, 163], Petitioners, Rich and Miller, as partners doing business as the C-46 Company, leased two of the aircraft which were used in performing the tour flights [Tr. 194-195].

There is no evidence that Trans-Global or its principals, Rich and Miller, played any other role in connection with the Dunes Tours. Although the Examiner found that there is a likelihood that petitioners Rich and Miller will attempt to resume the operations under another name, or otherwise attempt to avoid the Board's orders in the future, he significantly fails to make any finding, or to point to any evidence which supports this conclusion.

The Examiner made the following specific finding:

> "Thus the operation of the flights and advertising of the flights are in Dunes' name, all of the duties and services incident thereto except the physical operation of the aircraft are performed by Dunes, the aircraft used in their operation bear the Dunes markings, and all of the flights are operated under the Dunes complete direction, supervision and control." [Tr. 55-56.]

It follows from this finding that the activities of petitioners Rich and Miller and Trans-Global were merely ministerial. Their activities consisted, respectively of leasing aircraft and operating flights "under the Dunes' complete direction, supervision and control." If this finding is in accordance with the evidence of record, and it unquestionably is, then the Examiner's finding that there is a likelihood that operations will be resumed under another name unless petitioners Rich and Miller are enjoined individually, must fall.

This court's holding in *Las Vegas Hacienda Inc. v. C. A. B.*, 298 F. 2d 430, 440 (1962), has particular application in this proceeding. The court struck down a similar case and desist order against petitioner Price, because there was no substantial evidence that Price participated in the holding out of the tours.

The Board's injunction is directed against petitioners Rich and Miller both "individually and as principals in Trans-Global Airlines Inc." There plianly is no evidence to support the granting of an injunction against petitioners Rich and Miller, individually.[12] We submit that the record contains no proper basis for an injunction against petitioners Rich and Miller as principals in Trans-Global Airlines. Since the record does not support the inclusion of these petitioners in the injunction in either capacity, the Board's order should be modified accordingly.

The Board's Order Is Too Broad and Indefinite.

The Board has enjoined the petitioners from engaging in air transportation in violation of 49 U. S. C. Section 1371(a). This order does nothing more than command petitioners to obey the law, and is too vague, broad and indefinite to constitute notice to petitioners of activities they are forbidden to engage in. No one knows precisely what the technical phrase "engaging in air transportation" means, although it can fairly be said that it comprises virtually all flight activities which are subject to Board regulation. ". . . there should be no judicial approval of an order to cease and desist from we don't know what". Justice Jackson,

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[12]The Board does not contend that petitioners Rich and Miller engaged in "air transportation" individually.

dissenting in *F. T. C. v. Ruberoid Co.,* 343 U. S. 470, 494, (1952).

Petitioners, Rich, Miller and Trans-Global, each of whom engages in extensive aviation activities, other than the operation of the Dunes' flights,[13] may continue these activities, but only in peril of contempt proceedings, if they should stray over the line and enter the undefined area of air transportation. (See 49 U. S. C. Sec. 1487(a)).

This court, while sustaining a similar order in *Las Vegas Hacienda v. C. A. B.,* 298 F. 2d 430 (C. A. 9, 1962), nevertheless criticized the form of the order as undesirable (298 F. 2d 439-440, fn. 35). This court suggested that a decree should be drawn enjoining the acts which constituted violations and perhaps other unalwful acts reasonably related to the violations established (*F. T. C. v. Mandel Bros.,* 359 U. S. 385, 392-393, (1959)), provided the record discloses a proclivity to unlawful activity. *F. T. C. v. Beech-Nut Packing Co.,* 257 U. S. 441, 456 (1922).[14]

The record shows no proclivity to violate and no past violations on the part of any petitioners. Moreover, the facts of the situation here are readily distinguishable from *Las Vegas Hacienda Inc., supra,* and *Consolidated Flower Shipments, Inc. v. C. A. B.,* 213 F. 2d 814, 818 (C. A. 9, 1954), where the order

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[13]See Affidavit of petitioner, Donald Rich, in support of Motion for Stay of the Board Order in this proceeding, dated January 31, 1962. The operation of the Dunes Tour flights was discontinued in May, 1961 and have not been resumed.

[14]While the injunction may be expressed in generic terms, it must reasonably identify the prohibited conduct. (*F. T. C. v. Beech-Nut, supra.*)

was directed against persons not engaged generally in the operation of aircraft.[15] While a hotel operator such as Las Vegas Hacienda or the Dunes Hotel can understand that the order directs them to cease operating tour flights[16] the same is not true of the remaining petitioners who engage extensively in various other aviation activities.

The Board's order is not sufficiently particularized by reference to the Board's complaint, investigation and opinion. The Board's complaint is couched in the most general terms. Petitioners know nothing of the Board's investigation, and the Board's opinion simply indicates that the operation of these tour flights constitutes "air transportation" which requires a license under 49 U. S. C. Section 1371(a). Petitioners are left completely in the dark as to any other acts which might constitute future violations of the Board's injunction. As this court recently stated[17] the Board should ". . . frame an order prohibiting the illegal conduct in terms of objective criteria narrower than the statute yet broader than the precise facts of the particular case."

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[15]In the case of Las Vegas Hacienda Inc., aviation activities were limited to the performance of tour flights for hotel patrons.

[16]In the case of Hacienda, aviation activities were limited to the performance of tour flights. The order in the *Consolidated Flower case, supra,* in effect directed the petitioner to submit itself to limited C. A. B. regulation. No such alternative is available to the petitioners.

[17]In *Las Vegas Hacienda Inc. v. C. A. B.,* 298 F. 2d 430, 439-440, fn. 35 C. A. 9, 1962.

Conclusion.

For the foregoing reasons and authorities, the Board's order should be set aside or modified, or this court should order a remand to the Board for further proceedings.

Respectfully submitted,

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Attorneys for Petitioners.

No. 17314

In the United States Court of Appeals for the Ninth Circuit

M&R INVESTMENT COMPANY, INC., d/b/a DUNES HOTEL AND CASINO, AND FRED MILLER, DON RICH, MARVIN COLE, HARRY RIGGS, GRIMLEY ENGINEERING, INC., d/b/a TRANS-GLOBAL AIRLINES, AND CATALINA AIR TRANSPORT d/b/a CATALINA AIRLINES, PETITIONERS

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

ON PETITION FOR REVIEW OF AN ORDER OF THE CIVIL AERONAUTICS BOARD

BRIEF FOR RESPONDENT

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CITATIONS

640381—62——1

In the United States Court of Appeals for the Ninth Circuit

M&R Investment Company, Inc., d/b/a Dunes Hotel and Casino, and Fred Miller, Don Rich, Marvin Cole, Harry Riggs, Grimley Engineering, Inc., d/b/a Trans-Global Airlines, and Catalina Air Transport d/b/a Catalina Airlines, petitioners

v.

Civil Aeronautics Board, respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE CIVIL AERONAUTICS BOARD

BRIEF FOR RESPONDENT

JURISDICTIONAL STATEMENT

The jurisdiction of the Civil Aeronautics Board to issue the order here involved rested on Sections 204, 401 and 1002 of the Federal Aviation Act of 1958 (72 Stat. 731, 49 U.S.C. 1301 *et seq.*). The jurisdiction of this Court is invoked under Section 1006 of the Federal Aviation Act (49 U.S.C. 1486) which provides for the filing of a petition for review within sixty days after entry of the Board's order. The Board's order was entered on February 1, 1961, and the petition for review was filed on March 28, 1961.

COUNTERSTATEMENT OF THE CASE

Petitioners seek review of the Civil Aeronautics Board's Order E–16331 (R. 78, reconsideration denied, R. 106) in which they were found to have engaged in air transportation within the meaning of the Federal Aviation Act (*i.e.*, common carriage) by transporting passengers by aircraft as part of package tours, known as the "Dunes Magic Carpet Tours," between California points and Las Vegas, Nevada. Section 401(a) of the Act prohibits a person's engaging in air transportation without a certificate of public convenience and necessity issued by the Board and, since petitioners admittedly held no such certificate, the Board ordered all of them to cease and desist from further violation of Section 401(a).

M & R Investment Company, Inc., is a corporation which operates the Dunes Hotel, a resort hotel and gambling casino in Las Vegas.[1] Trans-Global Airlines (Trans-Global) and Catalina Air Transport (Catalina) are "Part 45 carriers," *i.e.*, carriers who hold operating certificates issued by the Federal Aviation Agency attesting to their compliance with various safety regulations applicable to private commercial carriage but who hold no economic authority issued by the Board for common carriage.[2] Donald Rich

[1] This petitioner is hereinafter referred to as "Dunes."

[2] "Part 45 carriers" take their name from Part 45 of the Civil Air Regulations (14 C.F.R. 45) which imposes the requirement that a safety operating certificate be obtained for private carriage for hire or other operations not subject to the economic regulatory provisions of the Act and which establishes the standards therefor. Such a certificate confers no license to engage in "air transportation" (common car-

and Fred Miller were stipulated to be "principals" in Trans-Global (R. 163) and, as partners in still another concern, they also owned some of the aircraft involved in the tour operations.[3]

Insofar as the traveling public was concerned, the Dunes Magic carpet Tours were virtually identical to the "Champagne Tours" which this Court recently held to involve air transportation within the meaning of the Act. *Las Vegas Hacienda* v. *Civil Aeronautics Board,* 298 F. 2d 430 (1962), certiorari pending, S. Ct., No. 821. For a single price, tour patrons purchased a package which included round-trip air transportation from Los Angeles and Burbank to Las Vegas, ground transportation between the airport at Las Vegas and the Dunes Hotel and various goods and services at the hotel.[4] Tour patrons were solicited from the general public by advertisements in classified telephone directories, newspapers and brochures (R. 26, 323, 347–364). The advertisements and brochures featured such lead lines as "Fly Free to Las Vegas" and included schedules of daily departures. Tours were sold at Dunes' sales offices in the Los Angeles area and at a ticket counter main-

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riage in interstate or foreign commerce) and issuance of a Part 45 certificate does not constitute a determination that the transportation actually performed is not "air transportation."

[3] Additionally, in their petition for stay filed with this Court on January 31, 1962, petitioners informed the Court that Rich and Miller were the officers, directors, and sole stockholders of Trans-Global Airlines. The record shows that Rich was President (R. 163) and Miller vice-president (R. 193).

[4] These were two cocktails and dinner at the hotel, a guaranteed show reservation and a bottle of champagne (R. 27).

tained by Dunes at the Lockheed Air Terminal (R. 26). They were also sold by travel agents on a commission basis and by Catalina (*ibid.*).

In terms of the internal arrangements, the tours differed somewhat from those involved in *Hacienda.* In that case, the hotel owned the aircraft, held the safety authority and conducted all phases of the operation, including physical operation of the aircraft, through its own employees. Here, however, the actual physical operation of the aircraft was performed by Trans-Global and Catalina under contract with Dunes (R. 26).[5] Some of the aircraft utilized, moreover, were owned by the carrier while others were leased to Dunes by Rich and Miller and operated by Trans-Global.[6] In all other respects, the tours were conducted by Dunes (R. 26).

Just as the Magic Carpet Tours were of the same general character as those involved in *Hacienda,* so

[5] Under these contracts, Dunes paid Trans-Global and Catalina a fixed amount for each round-trip flight and guaranteed them a certain number of flights per month. Trans-Global and Catalina were fully responsible for the operation of the aircraft and were required to pay the operating expenses and cost of all maintenance; to provide and pay a crew consisting of a captain, first officer, and stewardess; to provide the necessary cabin supplies; and obtain an insurance policy insuring each passenger seat for $100,000, naming Dunes as an additional insured (R. 331–337, 341–346).

[6] The examiner's findings (R. 31–32) disclose that Trans-Global and Catalina both operated tour flights for Dunes during 1958, each utilizing its own aircraft. During 1959 Dunes leased two aircraft from Rich and Miller. It had been contemplated that Catalina would operate the tours throughout 1959 but Catalina was unable to get the two aircraft placed on its operating authorization and accordingly the flights were operated by Trans-Global. For a while Dunes paid Catalina for these flights, but later payment was made directly to Trans-Global.

the central issue in the proceeding before the Board was the same, *i.e.,* whether the tours involved "the carriage by aircraft of persons . . . as a common carrier for compensation or hire" (Section 101(21), *infra,* p. 21).[7] Most of petitioners' contentions on this score, moreover, were the same as those advanced in *Hacienda.* Thus, they argued (1) that the service was not "for compensation or hire" because no portion of the total tour price was allocated to the so-called "free" transportation; (2) that the service was offered "in furtherance of a business or vocation" within the meaning of the statutory definition of "air commerce" (Section 101(20), *infra,* p. 20) and hence could not be held to be "air transportation"; and (3) that the so-called "primary business test" followed by the Interstate Commerce Commission with respect to property under the Motor Carrier Act required a holding that private carriage was involved. The examiner (R. 41–49) and the Board (R. 81) rejected these contentions for the same reasons that they had rejected them in *Hacienda.* Since this Court agreed with the Board in *Hacienda,* any further discussion of the Board's opinion on the same points here is unnecessary.

In addition to the foregoing contentions, petitioners also argued that common carriage was not involved because the flights were allegedly available

[7] As the Court is aware from its consideration of the *Hacienda* case, the quoted language is "central" (298 F. 2d at p. 433) in the statutory definition of "air transportation" and it is only to engage in "air transportation" that economic authorization from the Board is necessary.

only to "guests" of the Dunes Hotel and hence that the essential element of holding out was lacking. This contention rested primarily upon the fact that tour patrons were expected to sign a "guest register" at the airport before boarding the aircraft; that some of the newspaper advertisements stated that the tours were available only to hotel guests; and that the nontransportation features were available only at the Dunes Hotel (R. 29). The Board rejected the contention. It pointed out that a person may be a common carrier despite the fact that his offer relates to a limited portion of the public, so long as it is made to anyone of the public who chooses to place himself in the class to which the offer is made and held that this rule applies to *bona fide* hotel guests inasmuch as they are themselves members of the general public (R. 37–41). Moreover, the Board held, the contention had no basis in fact since the tours were held out to "the entire population of the Los Angeles area" and anyone from the general public was eligible so long as he paid the price of the tour (R. 37). The "guest register requirement" was found to be no more than a device adopted to lend color to the claim that the service was limited to hotel guests (*ibid.*).[8]

[8] In point of fact, it was not until the tours had been in operation for almost a year that the newspaper advertisements began to contain the statement that the service was limited to hotel "guests" and the "guest register requirement" was not seriously enforced until after the complaint was filed against petitioners (R. 29–30).

The Board also found no merit in petitioners' argument that evidence of violations occurring prior to January 1, 1959, the effective date of the Federal Aviation Act, was improperly received in evidence.[9] This contention rested upon the fact that the complaint, which was filed on June 15, 1959 (R. 1), charged violations of the Federal Aviation Act and it was petitioners' view that their activities during the time the predecessor Civil Aeronautics Act was in effect could not be considered.[10] Noting that the provisions involved were the same under both Acts, that there had been no interruption of the Board's authority under either Act, and that petitioners' violations began in 1958 and continued throughout 1959 without interruption, the Board found that petitioners' contention was one "of form rather than substance and, therefore, is not well taken" (R. 53–54). Assuming error, it continued, the error was in any event harmless since there was "substantial evidence . . . concerning violations committed . . . in 1959" (R. 53).

The petitioners questioned the propriety of including Rich and Miller in the cease and desist order but the Board rejected their contentions. Noting

[9] The Civil Aeronautics Act of 1938 (52 Stat. 973) was superseded by the Federal Aviation Act of 1958 (72 Stat. 731, 49 U.S.C. 1301 et seq.). Insofar as the provisions here involved are concerned, and as this Court recognized in *Hacienda* (298 F. 2d at p. 432), the 1958 Act is merely a recodification of the earlier statute. The reasons for the substitution of the one for the other are explained in the argument, infra, p. 13.

[10] The same contention was made in *Hacienda* but was abandoned on appeal.

that Rich and Miller were principals in Trans-Global, and, moreover, that in their individual capacities they provided the aircraft used on the tours, the Board concluded that the order should run against them as individuals if it was to be completely effective (R. 52).

Finally, and like the petitioners in *Hacienda,* the petitioners objected to the breadth of the order recommended by the examiner which enjoined them from "engaging directly or indirectly in air transportation within the meaning of Sections 101(10) and 101(21) of the Federal Aviation Act of 1958, in violation of Section 401(a) of the Act" (R. 58). The Board nevertheless adopted the recommended order, holding, as it had in *Hacienda,* that reference to the initial decision would "resolve any possible doubts as to what transportation services are prohibited" (R. 84).[11]

STATUTES INVOLVED

The provisions of the Federal Aviation Act principally involved are set forth in the Appendix, *infra,* pp. 20–21.

ARGUMENT

1. The Board properly found that the Dunes Magic Carpet Tours involved "air transportation" within the meaning of the Act

Petitioners concede, as they must, that the status of their transportation activities under the Act is

[11] The examiner's initial decision was adopted by the Board as its own findings and conclusions (R. 80) and thus was incorporated into the cease and desist order by specific reference (R. 87).

settled by the Court's decision in *Hacienda* unless there is some factual distinction (Br., p. 12). They have, therefore, abandoned their contentions that the tour flights were not operated for compensation or hire; that a contrast of the statutory definitions of "air commerce" (Section 101(20)) and "air transportation" (Section 101(21)) required a finding that they fell only within the former and hence were subject only to safety regulation; and that the Board was required to apply the "primary busines doctrine" and hold that the tours involved private carriage. In an attempt to distinguish the two cases, they pursue only their contention that the requisite holding out was lacking because the Magic Carpet flights were available only to guests of the Dunes Hotel (Br., pp. 12–14). The argument is wholly without merit.

As the Court recognized in *Hacienda* (298 F. 2d at p. 434), "the dominant factor in fixing common carrier status is the presence of a 'holding out' " of the service to the general public. Petitioners' contention is that the requisite holding out is lacking here because the service was limited to "guests" of the Dunes Hotel. Taken at face value this is obviously not so, since the transportation service was an integral part of a tour which was held out and available to the entire population of the Los Angeles area. It was limited to "guests" only in the sense that the purpose of the tour was to attract the general public to the hotel and casino, and to that end the tour was arranged in such manner as to attempt to insure that those members of the general public who purchased

it would actually patronize the hotel and casino facilities after arrival in Las Vegas. In other words, when petitioners say that it was limited to "guests" they mean simply that the tour was designed to attract only those members of the public who desired to go to the Dunes Hotel. This clearly does not in any way detract from its status as common carriage, any more than it did in *Hacienda*.[12] As this Court there pointed out, the Board "correctly" holds that "the purpose which motivates" the provision of a transportation service is not determinative, and it "is immaterial that the service offered will be attractive only to a limited group . . ." (298 F. 2d at p. 435). The point is that petitioners' transportation service was held out and available to any member of the general public who wished to avail himself of the facilities at the Dunes Hotel and this is enough. As the Interstate Commerce Commission said in an identical situation under the Motor Carrier Act, "the

[12] It is true that in *Hacienda* there was evidence that the tour operator was not always successful in its efforts to screen out persons who desired to purchase the tour simply as a means of obtaining cheap transportation and even that some salesmen connived at such purchases. Neither the Board's decision, however, nor that of this Court rested upon these occurrences.

In this connection, we note petitioners' reference to two factors not present in *Hacienda*, *i.e.*, the guest register requirement and the limitation in some of the newspaper advertisements to the effect that the tour was available only to guests of the hotel. The former was obviously an idle gesture, a fact borne out by petitioners' failure to attempt to enforce it seriously until after the filing of the complaint (R. 29–30). As to the advertising, the limitation placed no greater restriction on the availability of the tour than was actually involved in *Hacienda*.

public nature of the service . . . cannot be destroyed merely because applicants desire to limit their transportation facilities to those persons who also proposed to utilize their non-transportation [hotel] facilities." *Shores and Brown Common Carrier Application,* 26 M.C.C. 243, 245 (1940).[13]

2. The Board did not err in receiving and considering evidence of petitioners' activities ante-dating the Federal Aviation Act of 1958

The administrative complaint against petitioners was docketed on June 15, 1959, and charged that their operation of the Magic Carpet Tours was a violation of section 401(a) of the Federal Aviation Act of 1958, and it was that Act which the Board found they had violated. Since the statute did not become effective until January 1, 1959, petitioners assert that the Board improperly received and considered evidence with respect to the operation of the tours from the date of their inauguration in May, 1958 (R. 26), until January 1, 1959.[14]

While petitioners couch their argument on this point in terms of an alleged lack of substantial evi-

[13] Even where a transportation service is limited to persons who are in fact already guests of the hotel, the Supreme Court has held that common carriage is involved. *Terminal Taxicab Co.* v. *Kutz*, 241 U.S. 252 (1916). The Court there held that hotels hold their services out to the general public and transportation provided exclusively for such members of the public as choose to become guests of the hotel "affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so . . . The public does not mean everybody all the time.

[14] As previously indicated, the same argument was made in the petition for review in *Hacienda*, but was abandoned.

dence if the pre-1959 evidence is disregarded, it is difficult to believe that they are serious. As the examiner pointed out (R. 53), there is ample evidence to sustain the Board's order without regard to that which petitioners say was improperly received. See, *e.g.,* R. 164–192; 194–197; 199–201; 202–204; 210–301; 354–374. Indeed, the testimony of petitioners' witnesses and the stipulations of their counsel were confined to 1959 activities and make out an overwhelming case in support of the Board's decision.

Moreover, petitioners' argument is based on a misconception of the nature of the Board's action. The purpose of the proceedings was not to penalize petitioners for their past misconduct but rather to determine whether the Board should issue a remedial order to prevent them from further violating the law. In circumstances such as these, and especially since a continuous course of conduct was involved, it was entirely proper for the Board to consider petitioners' past conduct as throwing light on and revealing the character of their present activities, even if such past conduct were somehow barred from being made the subject of the proceedings. *F.T.C.* v. *Cement Institute,* 333 U.S. 683, 705 (1948); see also, *N.L.R.B.* v. *Clausen,* 188 F. 2d 439, 443 (C.A. 3, 1951); *Superior Engraving Co.* v. *N.L.R.B.,* 183 F. 2d 783, 791 (C.A. 7, 1950).

Furthermore, it is clear that the general savings clause (1 U.S.C. 109) preserved petitioners' liability under the old statute (*United States* v. *Segelman,* 117 F. Supp. 507 (D.C.W.D. Pa. 1953)), and, as

noted in the margin, the Board's action was in accordance with the plain intent of Congress.[15]

3. There was ample legal and factual basis for the Board's order with respect to Rich and Miller

Petitioners contend that the Board could not reach Rich and Miller primarily because there was no showing that they formed the Trans-Global corporation in order to insulate themselves against agency action or that they could be expected, as individuals, to attempt another violation of the law. Their contention rests upon an erroneous view of the law and an unrealistic appraisal of the evidence. Insofar as the law is concerned, their principal reliance is upon *R. J. Reynolds Tobacco Co.* v. *Federal Trade Com-*

[15] As the Court recognized in *Hacienda* (298 F. 2d at p. 432), the provisions of the Federal Aviation Act with which we are here concerned are identical to the corresponding provisions of the Civil Aeronautics Act. This results from the fact that the purpose of the Federal Aviation Act was to make extensive changes in the field of safety regulation while leaving unchanged the provisions relating to economic regulation. Congress noted that this could have been accomplished by a section-by-section amendment of the 1938 Act or by an amendment of the 1938 Act "to read as follows," but rejected both of these methods solely because the first was considered as fraught with danger and the second was considered cumbersome. See H. Rept. No. 2360, 85th Cong., 2d Sess., p. 10; H. Rept. No. 2556, 85th Cong., 2d Sess., p. 90. It chose instead to repeal the entire 1938 Act and to enact a new statute which, for present purposes, was a reenactment of the one repealed. But, in doing so, it made clear its intention that there was to be no break in the continuity of coverage, specifically stating with respect to the unchanged provisions that "reenactment . . . shall be considered to have the same effect as though the new act were amending the Civil Aeronautics Act 'to read as follows.'" H. Rept. No. 2360, 85th Cong., 2d Sess., p. 11.

mission, 192 F. 2d 535 (C.A. 7, 1951), which, they say (Br. p. 17), "clarified" the Supreme Court's holding in *Federal Trade Commission* v. *Standard Education Society,* 302 U.S. 112 (1937). What petitioners overlook, however, is that the *Reynolds* case has been specifically overruled on the precise point here involved. *Mandel Bros., Inc.* v. *Federal Trade Commission,* 254 F. 2d 18, 22–23 (C.A. 7, 1958).[16] The court recognized in *Mandel,* as the Supreme Court had in *Standard Education Society,* that a corporation can act only through its officers and agents and those who direct the affairs of a corporation in violation of the law may be enjoined from further violation individually.[17] Contrary to petitioners' contention, the legality of an order directed to the principals of a corporate law violator does not depend upon a showing that they formed the corporation for purposes of avoiding action by the agency or that the individuals may be expected to attempt another vio-

[16] Reversed on other grounds, *Federal Trade Commission* v. *Mandel Bros., Inc.,* 359 U.S. 385 (1959).

[17] The court of appeals in *Mandel* also rejected the contention, here advanced by petitioners, that those directing the corporation's affairs must be named in the administrative complaint. Moreover, there is no basis for the contention that Rich and Miller were not administrative respondents. They were charged in the complaint both as individuals and as partners in Trans-Global (R. 2). At the hearing, it was stipulated that Trans-Global was a corporation rather than a partnership and the corporation was substituted for the partnership as a respondent (R. 163), but nowhere on the record does it appear that the corporation was substituted for the individual respondents or even that any effort was made to have it substituted.

lation of the law.[18] *Standard Distributors* v. *Federal Trade Commission,* 211 F. 2d 7, 15 (C.A. 2, 1954). In that case, there was no showing that the individual, who was president of the corporation, had had anything whatsoever to do with the violations; indeed, he had attempted to prevent the practices of the corporation's employees which gave rise to the proceeding. Judge Learned Hand wrote, nevertheless, that under *Standard Education Society* the order may, without more, "include those officers of a corporation who are in top control of the activities that the Commission finds to have violated the Act."

This Court's holding with respect to Price in *Hacienda* is not to the contrary. It was based upon the fact that the record was insufficient to establish that Price had participated in Hacienda's violation as a principal. Indeed, the Court noted that Price could have been included had he been shown to be a principal, citing *Securities & Exchange Commission* v. *Universal Service Ass'n,* 106 F. 2d 232, 238 (C.A. 7, 1939); *Consolidated Flower Shipments, Inc.* v. *Civil Aeronautics Board,* 213 F. 2d 814, 818 (C.A. 9, 1954).

Rich and Miller cannot seriously dispute the fact that they dominate the Trans-Global corporation. They stipulated to being its principals (R. 163), and have added substance to this generality by admitting that they are its officers, directors, and sole stock-

[18] If this latter factor were required, it would seldom, if ever, be possible to issue a cease and desist order until there had been at least two violations. The whole purpose of any such order, no matter at whom directed, is to preclude the possibility of subsequent violations.

holders (R. 163, 193).[19] Obviously, therefore, they acted with "the same freedom as though no corporation existed."[20] The record clearly discloses that, as the persons responsible for directing the affairs of the corporation, they displayed willingness to make Trans-Global a partner with Dunes in the violation, by providing the regularly-scheduled service required by Dunes' holding out. In view of these circumstances, the Board was clearly justified in treating Rich and Miller as the equivalent of Trans-Global and in effect holding that the violations of the corporation were also the violations of the individuals. Moreover, it is important to bear in mind that Trans-Global owned no aircraft (R. 193). Rather, the aircraft which it used were owned by Rich and Miller (R. 52). Thus, the corporation was in reality no more than a paper carrier. Unless Rich and Miller are also to be restrained, it would be a simple matter for them to band together with some other hotel to provide similar tours without operating through Trans-Global and thus possibly to defeat a contention that such activities were conducted as successors and assigns of Trans-Global.

In sum, and unlike *Hacienda,* a separate corporation, wholly owned, directed, and dominated by Rich and Miller, here provided an essential element of the offense, *i.e.,* carriage pursuant to Dunes' holding out. In other words, their separate company in effect combined with Dunes to provide a transportation

[19] See also petition for stay, filed herein on January 30, 1962, together with affidavit of Rich in support thereof.

[20] *Standard Education Society*, *supra*, 302 U.S. at p. 120

service to the general public. It is settled that in such cases the Board may reach all those participating in the venture and those who direct the corporate participants. *North American Airlines* v. *Civil Aeronautics Board,* 240 F. 2d 867 (C.A.D.C., 1956), *cert. denied,* 353 U.S. 941; *Great Lakes Airlines* v. *Civil Aeronautics Board,* 291 F. 2d 354 (C.A. 9, 1961), *cert. denied,* 368 U.S. 890.

4. The Board's order is sufficiently clear and is not unlawfully broad

Petitioners' final argument that the Board's order is too broad and indefinite is based entirely on the erroneous premise that the order can be read as enjoining all conduct that might constitute "air transportation," within the meaning of the Act. This Court rejected the same contention with respect to an identical order in *Hacienda* and held that it enjoined only the type of conduct covered by the Board's complaint and opinion (298 F. 2d at p. 439) and, just one day prior to the Hacienda decision, the Supreme Court held that an order couched in similar broad terms was to be interpreted as dealing only with "future violations identical with or like or related to the violations * * * found to have [been] committed, or as forbiding 'no activities except those which if continued would directly aid in perpetuating the same old unlawful practices.'" *Federal Trade Commission* v. *Broch & Co.*, 368 U.S. 360, 366 (1962).[21] Indeed, the Board itself said as

[21] Like this Court's opinion in *Hacienda*, the Supreme Court emphasized the desirability of more precisely drawn orders but held that the lack of greater precision was not fatal, at least

much with respect to the order now before the Court. Its findings and conclusions with respect to the conduct which was the subject of the proceeding were incorporated into the order by specific reference (R. 87) and, when petitioners complained that the examiner's recommended order was too broad, the Board specifically stated that the transportation operations "which we are prohibiting . . . are set forth with sufficient clarity in the initial decision" (which the Board adopted) and that reference thereto "will resolve any possible doubts as to what transportation services are prohibited" (R. 84).

In short, there is simply no basis for the contention that the order extends to activities other than those like or related to the Magic Carpet Tour. It follows that petitioners' contention that they are not sufficiently apprised of the conduct enjoined is without merit. Equally without merit is their attempt

---

where the order was not self-executing. The Board's cease and desist orders are not self-executing, even after they have been sustained in statutory review proceedings. As in the *Broch* case, the Board's orders must be enforced by a district court (Section 1007, 40 U.S.C. 1487) and a violation of the order must be shown. Thus, petitioners would run no risk of penalties for contempt unless they later violated the district court's enforcement order.

It should also be noted that the terminology of the Board's order in no way increases petitioners' risk of incurring criminal penalties. Section 902 of the Act (49 U.S.C. 1472) imposes such penalties not only for violation of Board orders but also for any violation of, among other provisions, Section 401(a). Thus, if petitioners were to engage in activities constituting "air transportation" without obtaining a certificate of public convenience and necessity, they would be subject to criminal penalties regardless of whether the activities in question were within the scope of the Board's order.

to distinguish *Hacienda* on the ground that the order there sustained did not run against persons primarily engaged in extensive aviation activities. Petitioners concede that hotel operators such as Hacienda and Dunes "can understand that the order directs them to cease operating tour flights" (Br., p. 21), and there is no explanation of why Trans-Global, Rich, and Miller cannot understand that it directs them to cease engaging in operations of the same kind.

CONCLUSION

The Board's order should be affirmed.

Respectfully submitted,

LEE LOEVINGER,
Assistant Attorney General,
IRWIN A. SEIBEL,
Attorney.

JOHN H. WANNER,
General Counsel,
JOSEPH B. GOLDMAN,
Deputy General Counsel,
O. D. OZMENT,
Associate General Counsel,
Litigation and Research,
ROBERT L. TOOMEY,
JOHN F. RODGERS,
Attorneys,
Civil Aeronautics Board.

MAY 1962

APPENDIX

Relevant provisions of the Federal Aviation Act of 1958 (72 Stat. 731, 49 U.S.C. 1301 *et seq.*) are:

DEFINITIONS

SEC. 101. [72 Stat. 737, 49 U.S.C. 1301] As used in this Act, unless the context otherwise requires—

* * * * *

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided,* That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.

(4) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

* * * * *

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

* * * * *

(20) "Interstate air commerce", "overseas air commerce", and "foreign air commerce", respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the oper-

ation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same territory or possession of the United States, or the District of Columbia;

(21) "Interstate air transportation", "over seas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

* * * * *

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

SEC. 401. [72 Stat. 754, 49 U.S.C. 1371] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

U.S. GOVERNMENT PRINTING OFFICE:1962

No. 17314

United States
Court of Appeals
for the Ninth Circuit

M & R INVESTMENT COMPANY, INC., D/B/A THE DUNES HOTEL AND CASINO,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD.

Respondent.

Transcript of Record

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Phillips & Van Orden Co., 4th & Berry, S. F., Calif.—Rec. 1/26/62—Printed 2/28/62

Before the Civil Aeronautics Board
Washington, D. C.

Docket No. 10606

In the Matter of

M & R INVESTMENT COMPANY, INC., d/b/a DUNES HOTEL AND CASINO,

and

FRED MILLER, DON RICH, MARVIN COLE, HARRY RIGGS, GRIMLEY ENGINEERING, INC., d/b/a TRANS-GLOBAL AIRLINES,

and

CATALINA AIR TRANSPORT d/b/a CATALINA AIRLINES

ANSWER OF RESPONDENT

Trans-Global Airlines, Inc., d/b/a Golden State Airlines

Answering the Complaint of the Compliance attorney, Trans-Global Airlines, Inc., d/b/a Golden State Airlines (Respondent) sued herein as Fred Miller, Don Rich, Marvin Cole, Harry Riggs, Grimley Engineering, Inc., d/b/a Trans-Global Airlines and d/b/a Golden State Airlines, answering for itself alone, admits, denies and alleges as follows:

I.

Answering Paragraph 1, Respondent alleges that

it does not have sufficient information or belief to answer the allegations contained therein, and placing its denial on that ground, denies generally and specifically each and every allegation contained therein.

II.

Answering Paragraph 2, Respondent admits that Fred Miller, Don Rich, Marvin Cole and Harry Riggs are citizens of the United States and residents of the state of California. Except as expressly admitted herein, Respondent denies each and every allegation contained therein.

III.

Answering Paragraph 3, Respondent admits that the Grimley Engineering, Inc., is a citizen of the United States and is a corporation organized and existing under the laws of the state of California. Except as expressly admitted herein, Respondent denies generally and specifically each and every allegation contained therein.

IV.

Answering Paragraph 4, Respondent denies generally and specifically each and every allegation contained therein.

V.

Answering Paragraph 5, Respondent admits the allegations contained therein.

VI.

Answering Paragraph 6, Respondent alleges that it does not have sufficient information or belief to

answer the allegations contained therein, and placing its denial on that ground, denies generally and specifically each and every allegation contained therein.

VII.

Answering Paragraph 7, Respondent alleges that it does not have sufficient information or belief to answer the allegations contained therein, and placing its denial on that ground, denies generally and specifically each and every allegation contained therein.

VIII.

Answering Paragraph 8, Respondent denies generally and specifically each and every allegation contained therein.

IX.

Answering Paragraph 9, Respondent denies generally and specifically each and every allegation contained therein.

X.

Answering Paragraph 10, Respondent alleges that it does not have sufficient information or belief to answer the allegations contained therein, and placing its denial on that ground, denies generally and specifically each and every allegation contained therein.

XI.

Answering Paragraph 11, Respondent alleges that it does not have sufficient information or belief to answer the allegations contained therein,

and placing its denial on that ground, denies generally and specifically each and every allegation contained therein.

And further answering the Complaint, Respondent relies on any and all legal defenses which may be and become available to it, including but not limited to the following:

XII.

The Office of Compliance has failed to comply with the mandatory provisions of Section 5(b) of the Administrative Procedure Act, 5 U.S.C. Section 1004(b). This section provides that the Board must afford Respondent an opportunity for "* * * the submission and consideration of facts, arguments, offers of settlement, and proposals of adjustment * * *," before the institution of a formal enforcement proceeding. The facts do not bring this action within the exceptions contained in this section of the Administrative Procedure Act with regard to time, the nature of the proceeding and the public interest; nor have facts been pleaded to bring this case within the aforesaid exceptions. The Board must dismiss this proceeding because of the failure of the Office of Compliance to comply with Section 5(b) of the Administrative Procedure Act.

Wherefore, Respondent prays that the Complaint herein be dismissed and for such other and further relief as the Board may deem just and proper.

Respectfully submitted,

TRANS-GLOBAL AIRLINES, INC., d/b/a GOLDEN STATE AIRLINES,

By FRED MILLER.

Duly verified.

Certificate of service of copy attached.

Received July 20, 1959.

[Title of Board and Cause.]

ORDER DENYING MOTIONS

This proceeding was instituted on June 15, 1959, by the filing of a petition for enforcement by the Chief of the Office of Compliance, with a verified complaint attached, filed by a Compliance Attorney, which requested that the Board (1) order the M & R Investment Company, Inc., its agents, successors, and assigns to cease and desist from engaging in air transportation as such transportation is defined by Section 101 of the Federal Aviation Act of 1958, (2) order the Respondents Fred Miller, Don Rich, Marvin Cole, Harry Riggs, and the Grimley Engineering, Inc., and their agents, successors, and assigns to cease and desist from engaging in air transportation as defined by Section 101 of said Act, (3) order Catalina Air Transport, its agents, successors, and assigns to cease and desist from engaging in air transportation as defined

by Section 101 of said Act, and (4) grant such other and further relief as the Board may deem proper.

Answers to the petition and complaint and motions to dismiss the complaint were filed by Respondents M & R Investment Company and Catalina Air Transport on July 20, 1959. The motion of Catalina Air Transport requests the Board to dismiss the complaint. The motion of M & R Investment Company requests the Board to (1) dismiss the complaint and petition for enforcement, or (2) require the Office of Compliance to state a cause of action under the Federal Aviation Act, and (3) award such other and further relief as the Board deems just and proper. Answers to both motions were filed by the Compliance Attorney on August 27, 1959.

The Board, having fully considered the petition and complaint, the answers of Respondents thereto, and the motions and answers thereto, finds:

(1) That Respondent M & R Investment Company's protest of Rule 18(g) of the Board's Rules of Practice is without merit;

(2) The Respondents M & R Investment Company and Catalina Air Transport's contentions with respect to not being afforded opportunities for settlement have been answered by the Board previously in the proceeding Hacienda Hotels-Motels, etc., Docket No. 8462, decided February 19, 1958 (Order No. E-12192), and are without merit;

(3) That the complaint filed in this proceeding alleges that the violations charged against the Respondents are of a repeated and continuing nature and as such requires the Board in the discharge of its duties and responsibilities to take whatever immediate action may be appropriate to compel compliance by the Respondents with lawful requirements, and the public interest in law enforcement requires a prompt determination of the issues raised by the aforesaid petition for enforcement and complaint;

(4) That the complaint is sufficiently specific and definitive in stating a cause of action to meet the statutory requirements of the Federal Aviation Act of 1958.

It Is Therefore Ordered:

(1) That the motions of the Respondents be and they are hereby denied in their entirety.

(2) That the complaint be set down for hearing before an Examiner of the Board at a time and place to be hereinafter designated.

By the Civil Aeronautics Board:

[Seal] /s/ MABEL McCART,
Acting Secretary.

Proof of service acknowledged.

United States of America
Civil Aeronautics Board, Washington, D. C.

Docket No. 10606

In the Matter of:

M & R INVESTMENT CASE

Washington, D. C., Tuesday, December 1, 1959

The above-entitled matter came on for hearing, pursuant to notice, at 10 o'clock a.m.

Before: R. A. Walsh, Examiner.

Appearances:

MICHAEL H. BADER,
Representing Catalina Air Transport, d/b/a Catalina Airlines.

ROLAND E. GINSBURG, of
KEATINGE & OLDER,
Representing M & R Investment Company, Trans-Global Airlines.

THEODORE I. SEAMON,
Representing Pacific Air Lines, Inc.

RALSTON O. HAWKINS,
Representing Bonanza Air [49*] Lines, Inc.

ALBERT F. GRISARD,
Representing Bonanza Air Lines, Inc.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

WILLIAM E. McCOLLAM,
Office of Compliance, Civil Aeronautics Board. [50]

* * *

Mr. Ginsburg: At this time I would like to file a motion or I will make a motion to strike paragraphs 6 and 8 of the complaint insofar as they assert violations prior to January 1, 1959, of the Federal Aviation Act for the very obvious reason, your Honor, the Federal Aviation Act, at least the sections which respondent was charged with violating, was not in effect at that time.

Therefore, it would be impossible for the respondents to violate that act. As I understand it, and I reviewed the pleading carefully, we are charged only with violating the Federal Aviation Act of 1958, Section 4(1), of which became effective January 1, 1959; it is my understanding.

If I am wrong in my contention that only a violation of the Federal Aviation Act of 1958 is asserted in the complaint, well, I would like to hear a statement from the Office of [59] Compliance, if I am.

* * *

Examiner Walsh: Would you like to reply to the last motion, Mr. McCollam?

Mr. McCollam: I would like to say this with respect to [60] the M & R Investment Company's opportunity to be afforded an opportunity to settle this matter: In our answer to the various motions

filed by the respondents, we said that the Office of Compliance would carefully consider any offer submitted by the respondents. I am not aware of any offer made by the M & R Investment Company or the Trans-Global or the Golden State or the members of that corporation or rather, partnership; Miller, Rich, Cole, Riggs or Grimley Engineering Company. Until there is something offered there isn't very much we can do about it.

Now, with respect to paragraphs 6 and 8, having to do with whether or not the Acts prior to January 1, 1959, constitute a violation of the Federal Aviation Act of 1958 and Mr. Bader's motion against paragraphs 10 and 11, we fully discussed this particular objection in the Hacienda Case. I don't have that particular file with me. [61]

The Act, itself, has a savings clause in it. The complaint certainly is broad enough to cover the violations, and we feel that the violations prior to January 1, 1959, constitute violation of the Federal Aviation Act for 1958.

* * *

Mr. Ginsburg: There is one matter, your Honor, that I am not clear on and that is whether the Office of Compliance contends that all the violations are charged under the Federal Aviation Act of 1958. I raised that matter, I would like a ruling on it or statement on it.

* * *

Examiner Walsh: While addressing myself to the motions, all of the motions are denied.

Respondents have had a continuing privilege of filing [62] whatever offers of settlement that they might wish to have filed. They still have a continuing privilege to file offers of settlement, but there is nothing, to my knowledge, about an offer of settlement that can serve to disrupt or delay the orderly processess of the hearing. You may make those offers at any time.

The motions to strike paragraphs 7 and 8 of the complaint are denied, and the motions to strike paragraphs 10 and 11 are denied.

Insofar as the last motion is concerned, I know of no cessation or interruption of the statutory authority in the Board, either under the Civil Aeronautics Act of 1938, as amended, or the Federal Aviation Act of 1958. Nothing has been shown to me, at least, that there has been such an interruption of authority in the Board. Therefore, that motion is denied.

Mr. Ginsburg: Mr. Examiner, I would like the record to show at this time that the respondents that I represent hereby offer to sit down and negotiate the settlement with the Office of Compliance; that we are willing to make any change in the operation, which would be sufficient to the view of the Office of Compliance to remove any question that the respondents may be violating Section 410(a) of the Act, in transporting their own guests. I make that offer most seriously at this time. I would like the record to show that.

Mr. McCollam: On behalf of the Office of Compliance, I [63] will say this: that we will certainly

listen to any offer of settlement that the respondents represented by Mr. Ginsburg have to make. We don't feel that it is up to us to figure out some way to make their operations legal. If they can, well and good.

Examiner Walsh: I assumed that the gist of your motion was to delay the hearing, pending the submission of offers of settlement and negotiations with the Board.

As I indicated previously, the Board is not required to suspend or interrupt its hearing in that respect, except at the discretion of the Examiner or the Board, for the purposes of considering offers of settlement and negotiations. Accordingly, that motion is denied.

Mr. Ginsburg: I would like the record to show, your Honor, that——

Examiner Walsh: You may have continuing objections.

Mr. Ginsburg: If your Honor please, to clarify the record, my motion did not presuppose that there would be any delay of this hearing.

Examiner Walsh: Very well. [64]

* * *

JOSEPH W. STOUT

was called as a witness and, having been first duly sworn, was examined and testified as follows: [66]

* * *

Direct Examination

By Mr. McCollam:

Q. Will you state your occupation, Mr. Stout?

A. I am Chief of the Investigation Division of the Civil Aeronautics Board.

Q. How long have you been employed by the Civil Aeronautics Board?

A. Since September, 1948.

Q. All right, sir. Did you have an occasion to investigate the operations of the Dunes Hotel and Trans-Global Airlines? A. I did. [67]

* * *

Q. In the course of the investigation, where did you begin, Mr. Stout? A. In Los Angeles.

Q. And when did you begin the investigation?

A. September 1, 1958. [73]

Q. And what did you do?

Mr. Ginsburg: Mr. Examiner, I am going to move to object to these questions and move to strike the answers as to the date.

Examiner Walsh: I will overrule the objection. You may have a continuing objection.

Mr. Ginsburg: My objection is that those events occurred before the passage of the Federal Aviation Act, and therefore cannot be considered in this

(Testimony of Joseph W. Stout.)

proceeding, and therefore are not competent and relevant evidence.

Examiner Walsh: I think the record is clear.

Mr. Ginsburg: Thank you. I won't have to make this objection each time the testimony comes up concerning that period?

Examiner Walsh: That is right.

Mr. Ginsburg: Thank you.

Q. (By Mr. McCollam): What did you do?

A. I first obtained a copy of an advertisement of the Dunes Hotel, appearing in the 1958 edition of the Los Angeles classified telephone directory.

Mr. McCollam: Mr. Examiner, I would like to have this document marked for examination "OCA-1."

(Whereupon the document referred to was marked for identification as "OCA-1.") [74]

Q. (By Mr. McCollam): I show you what has been marked for identification as "OCA-1."

I ask you if you can identify that?

A. Yes, this is a photographic copy of the telephone directory advertisement that I referred to.

Q. All right. What does it show the telephone number of the Dunes as?

Mr. Ginsburg: I object, your Honor. The document speaks for itself.

Examiner Walsh: Overruled.

The Witness: It shows the telephone number as Bradshaw 2-7978, or Orlander 5-6077.

Examiner Walsh: Off the record.

(Testimony of Joseph W. Stout.)

(Discussion off the record.)

Examiner Walsh: On the record.

Q. (By Mr. McCollam): After you consulted the classified directory, Mr. Stout, what did you do?

A. Well, on this same day, September 1, 1958, at eleven o'clock a.m., I called this advertised number, Bradshaw 2-7978.

Q. And what response, if any, did you receive?

A. Well, I made this call for information——

Mr. Ginsburg: I object. Not responsive, your Honor. He asked what information he received, I believe. [75]

Examiner Walsh: Read the question.

(Question read.)

Examiner Walsh: Do you have the question, Mr. Stout?

Mr. McCollam: I will strike the question.

Q. (By Mr. McCollam): When you made the 'phone call, did anybody answer the 'phone?

A. The telephone was answered as "Dunes Hotel."

Q. Did you say anything?

A. I did. I mentioned that I was interested in a double-occupancy room at the Dunes Hotel around September 10 or 11, and I inquired about the rates, and during the course of the conversation—— [76]

* * *

(Testimony of Joseph W. Stout.)

Q. All right. What were those conversations that you had with this lady at the Dunes Hotel on the 'phone? Did you ask her about any rooms?

A. I did. I asked about the double occupancy rooms for September 10th and 11th, and about the rates, and she informed me that the rates ran from $10 to $16, and then I brought up this item that I referred to previously, where I had seen that guests of the hotel could fly free to Las Vegas, and I was informed by this person that only if the person purchased a tour—— [83]

* * *

Examiner Walsh: Have you finished your answer, Mr. Stout?

The Witness: No, sir. This person continued that this package deal was available at the rate of $36.95 per person in a double-occupancy room, and she mentioned that this package deal included a meal and show and some other features.

I then said that I was not sure that I would be able to take advantage of those other features because the plans were indefinite in Las Vegas. They wanted to know if I just—I am sorry—then I wanted to know if I just made reservations for the room, would I be permitted to fly free to Las Vegas?

Mr. Ginsburg: I object to this as not being the conversation.

Mr. McCollam: Mr. Examiner, we have gone through enough of this.

(Testimony of Joseph W. Stout.)

Examiner Walsh: Overruled.

The Witness: Then this person on the other end of the line said, if she could have my name, she would call back. I said that I could not give her my telephone number where I could be reached. I pursued this question, again, and asked if I made reservations at the Dunes for the room only, would I be permitted to fly free to Las Vegas in the Dunes plane? [85]

* * *

Examiner Walsh: What did the woman tell you with respect to the free transportation, Mr. Stout?

The Witness: She told me that I would have to buy the package deal at the hotel at the price of $36.95 per person.

Examiner Walsh: Very well.

The Witness: I continued the conversation and mentioned that the—well, that wouldn't be much more than the straight airline fare and the woman said, "That's correct." [87]

* * *

Q. (By Mr. McCollam): Did you during the course of this conversation ask the person to whom you were talking what airline flew these flights for Dunes? A. Yes.

Mr. Ginsburg: Just a minute. I object. The question is leading.

Examiner Walsh: Read the question.

(Question read.)

(Testimony of Joseph W. Stout.)

Examiner Walsh: Overruled. You may answer.

The Witness: I asked the of the airline and was informed that it was Trans-Global [88] Airlines.

* * *

Q. (By Mr. McCollam): Will you put your report aside, Mr. Stout? A. Yes, sir.

Q. Did you have occasion to call any travel bureau in Hollywood with respect to the Dunes' flight? A. Yes.

Q. Will you tell us when you made such a call?

A. It was on September 2, 1958. I made a telephone call to the Hollywood Knickerbocker Travel Service.

Q. Where is that?

A. That is located in the heart of Hollywood; Knickerbocker Hotel at 1714 Ivar Street, Hollywood, California.

Q. Did you talk to anybody in that Travel Agency?

A. Yes, I did. I talked to Miss Ann Schlossman.

Q. And what did she tell you?

A. Well, I inquired about——

Mr. Ginsburg: I object. It is not responsive.

Examiner Walsh: Overruled.

The Witness: In response to my inquiry about flights to Las Vegas from the Dunes Hotel, Miss Schlossman informed that flights were available at a price of $22.95.

Q. (By Mr. McCollam): Did she make a reservation for you? [86] A. She did.

(Testimony of Joseph W. Stout.)

Q. Did you, at a later time, have a personal conversation I say "conversation," not over the telephone?

A. Yes. On the afternoon of September 2, 1958, I went to the Hollywood Knickerbocker Travel Office and talked with Miss Schlossman in person.

Q. Did you ask here about your reservation?

A. Yes, I did, and at that time I purchased, a——

Mr. Ginsburg: Objection. Not responsive?

Examiner Walsh: Read the question.

(Question and answer read.)

Q. (By Mr. McCollam): Did you actually purchase this package tour? A. I did.

Q. Did you receive a receipt?

A. I did. I received a handwritten receipt from Miss Schlossman for the money that I paid for the Dunes reservation.

(Exhibit OCA-5, was marked for identification.)

Q. I show you what has been marked for identification as OCA-5, which is a photograph. Can you tell me what that is a photograph of?

A. This is a photograph of the handwritten receipt that I obtained from Miss Schlossman.

Q. You did not receive any ticket from Miss Schlossman, [87] is that correct?

Mr. Ginsburg: I am going to object. That is a leading question.

(Testimony of Joseph W. Stout.)

Q. (By Mr. McCollam): All right. Did you receive a ticket from——

Mr. Ginsburg: Same thing.

Examiner Walsh: Read the question.

(Question read.)

Q. (By Mr. McCollam): Did you ask for a ticket?

A. I did, but I was told by Miss Schlossman——

Mr. Ginsburg: That is the extent of the answer that is required.

Examiner Walsh: The answer is "yes." Frame your next questions.

Q. (By Mr. McCollam): What did Miss Schlossman tell you?

A. She told me that the Dunes Hotel did not give the travel agency's tickets. That the arrangements were to issue a receipt when the money is paid for the Dunes' Tour and that that receipt would be valid for the Dunes trip.

Q. When you purchased your ticket—I mean, how much money did you give Miss Schlossman?

A. $22.95.

Q. Did that include a room? [88]

Mr. Ginsburg: I object to the form of this question, your Honor. Why doesn't he ask what it included, rather than leading him?

Examiner Walsh: Rephrase your question, Mr. McCollam. Ask him what the $22.95 included.

(Testimony of Joseph W. Stout.)

Q. (By Mr. McCollam): What did the $22.95 include, Mr. Stout?

A. That was for the price of the Dunes' Magic Carpet Tour, which included the flight to Las Vegas and return, plus certain other features of the tour, but not including hotel accommodations at the Dunes. [99]

* * *

Q. During your previous telephone conversations with Miss Schlossman of the Knickerbocker Travel, what inquiry, did you make, if any, of the tour?

A. Well, I had asked about the type of airplane that would be operated and at that time Miss Schlossman said she did not know. However, when I later went to the office——

Mr. Ginsburg: Objection. He is talking only about the telephone conversation now.

Mr. McCollam: No——

Mr. Ginsburg: May we have the question read back?

Examiner Walsh: Read the question, Miss Arms.

(Question read.)

Examiner Walsh: Overruled.

Mr. Ginsburg: Your Honor, please——

Examiner Walsh: Overruled.

Mr. Ginsburg: ——is limited to the telephone conversation.

The Witness: As I say, Miss Schlossman in-

(Testimony of Joseph W. Stout.)

formed me of the name of the type of plane used on the Dunes flight, when I inquired about this during the telephone call. When I later visited the Hollywood Knickerbocker Travel Office, Miss Schlossman told me that she had found out the type of plane and said it would be a C-46.

At that time I asked if I would be required to stay at the hotel, the Dunes Hotel, and she said that I would not and she added that the price of the Dunes Magic Carpet Tour, which I [100] purchased, covering the air trip to Las Vegas, was actually less than the round trip air coach fare which she quoted as $33.15.

Q. (By Mr. McCollam): Did there come a time when you took the trip on the Dunes?

A. Yes.

Q. Will you tell us where you checked in and when you checked in?

A. I checked in at the Dunes ticket counter at the Lockheed Air Terminal, Burbank, California, at approximately six forty-five p.m. on September 3d, 1959.

Q. Did you say that you took the trip on September 3, 1959?

Mr. Ginsburg: I object to that question.

The Witness: No. If I did——

Mr. Ginsburg: Just a moment. I have an objection, sir. This question has been asked and answered. He can have it read back, if he wants to.

Examiner Walsh: Will you find Mr. Stout's answer to that question?

(Testimony of Joseph W. Stout.)

(Answer read.)

Examiner Walsh: Is that a correct answer?

The Witness: That is an obvious mistake. I well recall it was September 3, 1958. [101]

Mr. Ginsburg: I didn't even realize that you said '59. There is no problem about that.

Examiner Walsh: Correct the record.

Mr. Ginsburg: He can change the record to 1958, if he wants to.

Examiner Walsh: Off the record.

(Discussion off the record.)

Examiner Walsh: On the record.

(Documents referred to were marked for identification as "OCA"-6 to "OCA"-10, inclusive.)

Q. (By Mr. McCollam): I show you, Mr. Stout, photographs which have been marked for identification as "OCAA"-6, "OCAA"-7, "OCCA"-8, "OCCA"-9, and "OCCA"-10.

Mr. Ginsburg: Is that the way you want it? You have two "a's," double "a."

Mr. McCollam: Have I been saying "AA"?

Mr. Ginsburg: Yes.

Examiner Walsh: Just make it one "A."

Q. (By Mr. McCollam): I ask you if you can identify those, Mr. Stout? A. Yes.

Q. What are they photographs of, Mr. Stout?

A. Photographs of the tickets and gateways which were re-issued to me in exchange for the receipt I had previously [102] obtained from the Hollywood Knickerbocker Travel Service.

(Testimony of Joseph W. Stout.)

Those copies of the tickets and gate passes that were issued by the Dunes ticket office at Burbank, Lockheed Air Terminal—— [103]

* * *

Q. The original documents from which those photographs were taken, do you have those in your possession, sir, or in the possession of this office?

A. I believe the Office of Compliance has them, yes. That is, with the exception of certain of the coupons that were removed from OCA-9.

Q. Who removed these coupons from the booklet?

Mr. Ginsburg: Objection. There is no objection that anything has been removed. I object to the question.

Examiner Walsh: Overruled.

The Witness: The limousine driver removed the one for limousine service.

Q. What exhibit are you looking at?

A. At "OCA"-9.

Q. Yes.

A. When I was transported from the airport in Las Vegas to the Dunes Hotel, and the other coupons that were removed were picked up by representatives of the Dunes Hotel, on the premises of the Dunes Hotel. [104]

* * *

Q. When you boarded the plane, did you notice any other people on the plane?

(Testimony of Joseph W. Stout.)

A. Yes. [107]

Q. Did the plane have a hostess on it?

A. Yes.

Q. Did the plane—in the interior of the plane, were other people seated in seats like you had?

A. Yes.

Q. Do you know whether or not any of those people used the same kind of boarding pass?

Mr. Ginsburg: I object. The questions are leading and call for a conclusion. There is no foundation. Let him state what happened.

Examiner Walsh: Well, I will sustain the objection, but subject to the qualification of my questioning the witness.

Do you know whether any of the other persons aboard the aircraft, to your own personal knowledge do you know, whether they had a boarding pass similar to the one that you had received?

The Witness: I didn't examine any such boarding passes in detail, no.

Q. (By Mr. McCollam): Describe the procedure that you went through, Mr. Stout, in boarding the plane.

A. Well, of course, after I had checked in at the Dunes ticket counter and received the re-issued ticket and the gate pass, shortly before I boarded I heard an announcement——

Mr. Ginsburg: I object. None of this is responsive. It is [108] boarded the aircraft that the question is directed to.

Mr. McCollam: I submit this is responsive.

(Testimony of Joseph W. Stout.)

Examiner Walsh: Read the question.

(Question read.)

Examiner Walsh: Is that preliminary to your answer?

The Witness: Yes, it is all part of the observations.

Examiner Walsh: Very well, proceed.

Objection overruled.

Mr. Ginsburg: The record shows my objection.

The Witness: I heard an announcement over the public address system in the Lockheed Air Terminal, directing the passengers for Las Vegas to board the Dunes flight No. 711. I then proceeded to the gate and before boarding the aircraft, which was identified as "Dunes Hotel," I showed my gate pass to one of the attendants, and I observed other passengers doing likewise. [109]

* * *

Q. (By Mr. McCollam): I show you what has been marked for identification as "OCA-5-A" and ask you if you can identify this material.

A. Yes. This is a piece of advertising material that I picked up at the Dunes ticket counter at the Lockheed air terminal at Burbank on September 3, 1958.

Q. You finally took the flight that day, isn't that correct? A. Yes.

Q. Where did the flight go?

A. To Las Vegas. [114]

(Testimony of Joseph W. Stout.)

Q. When the plane arrived at Las Vegas, what happened?

A. Well, there was an attendant that met the flight and instructed passengers who wished to go to the Dunes Hotel to board the waiting limousine.

Q. Will you describe this limousine?

A. Well, it is typical—a typical limousine——

Q. Please describe it.

Mr. Ginsburg: Objection.

Examiner Walsh: Overruled.

The Witness: It was a Tanner Motor Lines bus that is typical of the type used in ground service, transporting passengers between the city and city terminals and the airport.

Mr. Ginsburg: Objection, and move to strike. It is a characterization of the witness. He can describe what he saw. He doesn't have to tell what he thinks of it.

Examiner Walsh: Overruled.

Q. (By Mr. McCollam): Did you board the bus? A. I did.

Q. Where did you go?

A. To the Dunes Hotel.

Q. And what did you do there?

A. Well, I met Agent Hamilton there, and we got a room for us at the hotel. Then I continued my investigation [115] of the other features of the Dunes tour.

Q. Did there come a time when you talked to Major Riddle, president of the M & R Investment Company?

(Testimony of Joseph W. Stout.)

Mr. Ginsburg: Objection. There is no testimony —well, I think there is a verified answer. I will withdraw it. We will stipulate Mr. Riddle's presence.

Examiner Walsh: Show the objection is withdrawn.

The Witness: Yes, I talked to Major Riddle the following day, September 4, 1958.

Q. (By Mr. McCollam): Where was this?

A. At the Dunes Hotel in Las Vegas.

Q. Did you tell Mr. Riddle the purpose of your visit? A. Yes, I did.

Q. What did you say to him?

A. I told him that we had had inquiries concerning the Dunes flight operations, and wanted to talk to him to get first hand information and material on the operation, and he told me he would cooperate.

Q. Did Mr. Riddle tell you with what airlines he was operating? A. Yes.

Q. What airlines was it?

A. Trans-Global Airlines.

Q. Did he tell you how much he was paying for the use [116] of those airplanes?

* * *

A. Yes, $675 a round trip, with a guarantee of a [117] minimum of twenty-five trips a month, regardless of how many passengers flew.

Q. Did he tell you who performed the ticketing functions? A. Yes, he did.

(Testimony of Joseph W. Stout.)

Q. And who performs those?

A. The employees of the Dunes Hotel.

Q. And what was the function of Trans-Globe?

A. Trans-Global merely——

Mr. Ginsburg: I object, unless this is related to the conversation.

The Witness: This is the substance of what he told me.

Examiner Walsh: Testify as to what he told you, Mr. Stout. Objection overruled.

The Witness: He told me that Trans-Global performed the mechanical operation of the aircraft and that the other services, such as reservations, ticketing, baggage weighing, et cetera, were performed by Dunes Hotel employes.

Q. Did he tell you who pays for the space and facilities used at the airport?

A. Yes, Dunes Hotel.

Q. Did you discuss with Mr.—did you ask Mr. Riddle what arrangements we had with travel agencies? A. Yes, yes.

Q. What did he tell you?

A. I asked him about the commission payments on tickets [118] sold by such agencies as Hollywood Knickerbocker Travel Service, and he stated that the Dunes paid the agents a commission on each such ticket sold.

Q. Did he tell you the purpose of those flights?

A. Yes. He said the purpose was to get as many persons into the Dunes as possible. He added that he contemplated using buses and train.

(Testimony of Joseph W. Stout.)

Q. Did Mr. Riddle tell you, say anything to you about whether or not the operation was operating at a profit and loss? A. Yes.

Q. What did he say?

A. He said that the operation was conducted at a loss of $9,000 the last month, and $17,000 the month prior to that.

Q. You are talking about the month prior to your conversation?

A. That is right, with reference to the time of my conversation.

Q. Did you question him concerning the cost allocation of the operation?

A. I did. I asked Mr. Riddle if he kept an accounting of the costs and revenues for the Dunes flights, and he stated that he did. I questioned him further about this, and he mentioned that——

Mr. Ginsburg: Objection. You should give the conversation. [119]

Examiner Walsh: Just tell us what he told you.

The Witness: Well, he said that he couldn't determine exactly what part of the monies paid by the passengers for the Dunes flight went to each particular item. For example, the chuck wagon buffet. However, he said that he had figured that the cost for the buffet was four dollars, and he assumed that the profit derived from the passengers by the casino would offset any losses incurred on other parts of the package tour. [120]

* * *

(Testimony of Joseph W. Stout.)

Q. Did you go back on a Dunes flight?

A. No, sir.

Q. I take it from exhibt—you have and you had—did there come a time when you returned to Los Angeles? A. Yes.

Q. And did you have your return ticket with you at that time? A. Yes. [121]

* * *

Q. What did you do with the tickets?

A. I went into the Dunes ticket counter at Lockheed Air Terminal, Burbank, September 4, 1958, where I talked with Mr. Chris Graham, representative of the Dunes, and asked him if I could obtain a refund——

Mr. Ginsburg: I object to that characterization of Mr. Graham. There is no foundation. [122]

The Witness: That is what I said.

Mr. Ginsburg: I move to strike it.

(Answer read.)

Examiner Walsh: Strike the portion, "representative of the Dunes."

Tell us, who is Chris Graham?

The Witness: He was behind the ticket counter and told me he was a representative of the Dunes.

Examiner Walsh: Where?

The Witness: Lockheed Air Terminal, Burbank, California.

I asked him about getting a refund and he said he could not grant a refund on the return ticket, but I could have used the ticket later.

(Testimony of Joseph W. Stout.)

* * *

Cross-Examination

By Mr. Ginsburg: [123]

* * *

Q. Referring only to your investigation of the Dunes Hotel in September, 1958, prior to the time that you boarded the aircraft, did anyone whom you contacted concerning the trip to the Dunes Hotel ever speak to you about airline fares?

A. You mean airline fares to Las Vegas?

Q. To Las Vegas, yes. A. Yes.

Q. Who was that?

A. Well, in the conversation I had with the person on the call to the Dunes Hotel on September, 1958, I mentioned that the cost of the package tour seemed to be less than the airline fare itself, and this person I was talking with said that that was correct.

Q. You brought up the subject, is that right?

A. Yes, and then again——

Q. Did you compare that fare—strike that please. Did [135] you compare the cost of the tour with anything else, other than airline fares?

A. No. I made another comparison similar to that one when I talked to Miss Schlossman.

Q. Just on this first conversation, for the moment. This is on the Bradshaw number, is that correct? A. That is right.

(Testimony of Joseph W. Stout.)

Q. Did you compare the cost of the tour with anything other than the airline fare? A. No.

Q. When was the next mention of the airline fares made and by whom?

A. Miss Schlossman at the Hollywood Knickerbocker Travel Service.

Q. Was this over the 'phone, Mr. Stout or in person.

A. That was over the 'phone. I don't remember this morning whether I said that was in person or over the 'phone, but it actually was.

Q. You are certain it was over the 'phone?

A. Yes, over the 'phone during my telephone call to the Hollywood Knickerbocker Travel Service. I asked Miss Schlossman if I would be required to stay at the Dunes Hotel and she said it wasn't necessary and then she volunteered this information and said actually the cost of the air trip is less than the round trip coach air fare, which I believe, she quoted as $33.15. [136]

Q. You had not mentioned the comparison prior to this? A. No, she volunteered that.

Q. When did Miss Schlossman mention, again, that you were not required to, as you say, stay at the Dunes Hotel?

A. I don't believe she mentioned that again.

Q. When did she mention it to you?

A. Well, I asked her if it was required.

Q. When?

A. When I called her on the telephone September 2, 1958. That is when I made the telephone

(Testimony of Joseph W. Stout.)

call to the hotel—Hollywood Knickerbocker Travel Service.

Q. She knew at that time, did she not, that you were not staying overnight, is that right?

A. No, she didn't know but what I might be making reservations to stay somewhere else in Las Vegas. I don't think she had any knowledge of that.

Q. Wasn't she selling you a ticket for $22.95—a tour ticket? A. That is right.

Q. And you know, do you not, that the price is $33.15 or something in excess of $22.95, if you are staying overnight?

A. Yes, the price is more if you stay at the Dunes Hotel. If that is taken in as part of the Dunes Package Tour it would still be $22.95, if I went over on the flight and stayed some [137] place other than the Dunes.

* * *

Q. Now, again referring to your investigation of the Dunes Hotel in September, 1958, prior to boarding the aircraft with a flight to Las Vegas, were you ever informed of the name of the air carrier who would operate the flight? A. Yes.

Q. And who informed you of that?

A. Well, the person at the Dunes Hotel number that I called September the first, 1958, stated the airline would be Trans-Global. [139]

Q. In a telephone conversation—strike that. Did you ever tell either Miss Schlossman or the person

(Testimony of Joseph W. Stout.)

at the Bradshaw number that you didn't think you would be able to take advantage of the features, other than the flight to Las Vegas?

A. I told the person that I called at the Dunes Hotel, the Bradshaw number, that I might not be able to take advantage of those features, yes. [156]

* * *

BERNARD B. BURNS

was called as a witness, and, having been first duly sworn, was examined and testified as follows: [161]

Direct Examination

By Mr. McCollam:

Q. Mr. Burns, will you state your full name and occupation for the record?

A. Bernard B. Burns, Special Agent, Office of Compliance, Civil Aeronautics Board.

Q. How long have you been employed by the Civil Aeronautics Board? A. Three years.

Q. Mr. Burns, did you have an occasion to make an investigation of the Dunes flights between Las Vegas—between Burbank and Las Vegas?

A. Yes. [162]

* * *

Q. Now, will you lay that report aside? Will you tell us approximately when you made your investigation of the Dunes flights?

A. On September 17, 1958.

Mr. Ginsburg: Excuse me. I am going to object

(Testimony of Bernard B. Burns.)

at this point, to an objection that I have raised before to any evidence prior to the adoption of the—of the effective date, I should say, of the National Aviation Act—the National Federal Aviation Act, which became effective January 1, 1959.

Examiner Walsh: Yes, you may have a continuing objection as to the testimony of all the witnesses.

Mr. Bader: May I join in that? [163]

Examiner Walsh: Yes.

Mr. McCollam: That is the understanding we have, anything prior to the Federal Aviation Act, you object to?

Mr. Ginsburg: Right.

Examiner Walsh: I think I stated previously that counsel for the respondents could have a continuing objection with respect to all the testimony of all witnesses for the Compliance Office relating to that period.

Q. (By Mr. McCollam): Did you go on the Dunes flight, Mr. Burns? A. Yes, I did.

Q. Will you tell us how you obtained your passage upon that flight? What steps you took to obtain passage on that flight?

A. Well, first, on September 17, 1958, I made a telephone call to the Boulevard Travel Service, inquiring into reservations on the Dunes flights.

Mr. Ginsburg: I am going to object on any testimony regarding this call. I move to strike what has been testified to on the grounds that it is hearsay.

(Testimony of Bernard B. Burns.)

Examiner Walsh: Objection overruled. You may answer.

Q. (By Mr. McCollam): What did you find out at the Boulevard Travel Service?

A. I was told, when I inquired into Dunes flights, I [164] was told that it did not represent the Dunes flights, and I should call the operator, the Dunes operator, itself, at the Bradshaw number, Bradshaw 2-7978.

Mr. Ginsburg: I now renew my motion to strike, Mr. Examiner. It is clearly hearsay. It is not the conversation of the respondents or the agent.

Mr. McCollam: I think the objection is valid. It has nothing to do with the case, and I will withdraw that particular bit of testimony.

Examiner Walsh: Very well.

Q. (By Mr. McCollam): Did you call the Bradshaw number? A. Yes, sir.

Mr. Ginsburg: We will stipulate that Bradshaw 2-7978 is the Dunes telephone number in Los Angeles.

Examiner Walsh: Very well. Continue your testimony from the point of the Bradshaw telephone number.

Q. (By Mr. McCollam): What happened when you called the Bradshaw number?

A. Well, the telephone was answered, Dunes Hotel, and I asked if there was any space on the evening flight, of that evening, September 17th, to Las Vegas, and I was told that there was space on this flight.

(Testimony of Bernard B. Burns.)

Q. Did you inquire as to the price of the tour?

A. Yes. I asked what the price was. [165]

Q. What did you find out?

A. It was quoted as $22.95.

* * *

The Witness: Yes, I inquired what this $22.95 consisted of, and I was told that that would cover the round trip air transportation between Burbank and Las Vegas, the limousine transportation from the Las Vegas airport to the Dunes Hotel, buffet dinner or supper at the Dunes Hotel, a bottle of champagne on the flight itself.

Q. (By Mr. McCollam): Did you purchase a ticket? A. Yes, sir.

Q. Where did you purchase the ticket and when did you purchase the ticket?

A. I purchased that ticket on September 17, 1958, at [166] the Burbank airport, the Dunes Hotel ticket counter. [167]

* * *

Q. Now, did there come a time when you went aboard that flight? A. Yes, sir.

Mr. Ginsburg: Objection. I don't know what flight we are talking about. Do you want to amend your question to say "that plane"?

Q. (By Mr. McCollam): Did you go aboard that plane, Mr. Burns? A. Yes, sir.

Q. When did you go aboard that plane?

(Testimony of Bernard B. Burns.)

A. Approximately 7:30 p.m. on September 18, 1958.

Q. Will you describe the boarding procedure? What you went through?

A. Well, shortly before 7:30 or around that time, an announcement was made over the loud speaker.

Q. What was the announcement?

A. That announcement was, "The Dunes Hotel Flight 711 for Las Vegas now boarding at Gate 6. All aboard, please."

(Document referred to as "OCA" 12-F was marked for identification.) [174]

* * *

Q. All right. Now, Mr. Burns, after the announcement, did you board the plane?

A. Yes, I did.

Q. And did you see anyone else on the plane?

A. Yes.

Q. Could you describe how many people you did see on the plane or tell us how many people you saw on the plane?

A. I couldn't tell you the exact number.

Q. Well, would you say that there were more than ten? A. Oh, yes.

Q. Would you say that there were less than—would you say more than 25? [175]

A. I would say there were more than 25.

Q. Where did the flight go, Mr. Burns?

(Testimony of Bernard B. Burns.)

A. To Las Vegas, Nevada.

Q. What time did you arrive there?

A. Approximately 8:15 or thereabouts.

Q. I see. A. That was p.m.

Q. What did you do after the plane landed?

A. I deplaned with the rest of the passengers from the plane.

Q. What did you do?

A. And I followed those passengers to a bus, Tanner Motor Tour bus.

Q. Do you know whether all the passengers went on the bus or not?

A. I don't know whether all of them went on.

Q. Do you know—did you see any who did not go on?

A. I don't recall seeing any that did not go on.

Q. Where did the bus take you?

A. To the Dunes Hotel, in Las Vegas.

Q. What did you do there, if anything?

A. At the hotel I went to the desk clerk and I inquired for Mr. Riddle.

Q. Were you able to see Mr. Riddle?

A. No, sir. [176]

Q. Did you make inquiries as to the whereabouts of anyone else?

A. Yes, I asked for Mr. Riddle's secretary, Mrs. O'Rourke, and I was informed that she wasn't in but that she would be in the following day at noon.

Q. Where did you stay, if any place, in Las Vegas?

(Testimony of Bernard B. Burns.)

A. I stayed overnight at the Beacon, the Beacon Inn Motel. [177]

* * *

Q. Mr. Burns, I show you what has been marked for identification as "OCA"-19. Did you take that picture, sir? A. Yes. [186]

Q. Where did you take this picture?

A. I took this picture in the Accounting Department of Dunes Hotel.

Q. Who furnished you with the document that you photographed there?

A. Mr. Dave Duran.

Q. Who is he?

A. He was at that time the accountant, chief accountant for the Dunes Hotel.

* * *

Q. Mr. Burns, prior to taking the photograph—where [187] did you take the photograph? Where did you take the photograph?

A. I took the photograph in the Accounting Department office.

Q. Of where? A. Of the Dunes Hotel.

Q. Now, before taking that photograph, did you consult with anybody in the Dunes Hotel?

A. Yes, I did.

Q. With whom did you consult or talk?

A. I consulted, first, with Mrs. O'Rourke.

Q. And do you know—did you know who Mrs. O'Rourke was or is, or was at that time?

(Testimony of Bernard B. Burns.)

A. Major Riddle's secretary.

Q. And what did she tell you?

A. She told me that the documents that I was to examine in the Dunes Hotel were available for my examination through Mr. Dave Duran, who had those records for me.

Q. I see. Now, what is this photograph that you have in your hand a photograph of?

A. This is a photograph of the aircraft charter contract between Trans-Global Airlines and the Dunes Hotel. [188]

* * *

Q. (By Mr. McCollam): Mr. Burns, I show you what has been marked for identification as "OCA"-20 through "OCA"-40. Did you take those photographs, Mr. Burns? A. Yes.

Q. Where did you take those photographs?

A. In the Accounting Department of the Dunes Hotel.

Q. Who furnished you the documents that those photographs depict? A. Mr. Dave Duran.

Q. That is the same Mr. Duran that you identified as the auditor or accountant of the Dunes, is that correct? A. That is correct.

Q. When were those documents photographed?

A. Those were photographed in the afternoon of September 18, 1958.

Q. And what did those documents relate to, Mr. Burns?

A. Those are accounting documents relating to

(Testimony of Bernard B. Burns.)

transactions between the Dunes Hotel and Trans-Global Airlines.

Q. Where did you obtain that information from, Mr. Burns? A. From Mr. Duran.

Q. Now, will you compare "OCA"-20 with "OCA"-21?

Mr. Ginsburg: Objection. Improper. All the witness can do is testify as to facts. His conclusions and judgments are [192] not admissible.

Examiner Walsh: Wait until the ruling is made. I am going to sustain the objection, and ask you to rephrase your question.

Q. (By Mr. McCollam): Will you look at "OCA"-20? A. Yes, sir.

Q. Will you tell us what that is?

A. This, I was informed, is the remittance invoice in the amount of $2,700.

Q. From whom?

A. From the Dunes Hotel.

Q. To whom? A. Trans-Global Airlines.

Q. Will you look at "OCA"-21? How much was the amount of the remittance?

Mr. Ginsburg: I am going to have to object, your Honor. Those documents speak for themselves.

Examiner Walsh: Anticipating further questions on the same subject, I will overrule your objection and see what it is.

Q. (By Mr. McCollam): "OCA"-21 is in the amount of how much? A. $2,700.

(Testimony of Bernard B. Burns.)

Q. Did you ask Mr. Duran about those documents? [193] A. Yes.

Q. What did he tell you?

A. He told me they represented payments. For example, "OCA"-21 represented payment from the Dunes to Trans-Global Airlines for $2,700, which was the deposit that the Dunes gave Trans-Global at the inception, or according to the contract between Trans-Global and Dunes.

Q. I see. Now, "OCA"-23, 24, 25, 26, 27, 28, 29, 30 through -35, what did you understand those to be from?

* * *

The Witness: Those documents were given to me by Mr. Duran and according to him they represented payments from the Dunes Hotel to Trans-Global Airlines.

Q. (By Mr. McCollam): For whom?

A. For Dunes Hotel.

Q. What is "OCA"-36, Mr. Burns?

A. "OCA"-36 is an invoice from Golden State Airlines to Dunes Hotel.

Q. And what is -37? [194]

A. -37 is the payment, a copy of the payment from the Dunes Hotel to Golden State Airlines in the amount of $675.

Q. And -38 and -39 are what?

A. Exhibit No. "OCA"-38 shows four checks representing payments from the Dunes to Trans-Global Airlines; and -39 is the reverse side of those checks, cancelled checks.

(Testimony of Bernard B. Burns.)

Q. And -40 is what?

A. -40 is a distribution ledger, Dunes Hotel, showing the account of Magic Carpet flight, and that represents the payments for the flights. [195]

* * *

Q. After obtaining those various exhibits that you have referred to in your testimony, did you have any further discussion with Mr. Duran?

A. Yes.

Q. What did he say?

A. The discussion we had was relative to——

Mr. Ginsburg: Objection. Not responsive. The question was, "What did he say?", meaning Mr. Duran.

Examiner Walsh: Will you answer in that posture, Mr. Burns?

The Witness: He stated that approximately 5200 passengers had been carried since the inception of the Dunes Tours, from [212] May 8th through, if I recall the date exactly, the end of August. I am not too sure of that date.

Examiner Walsh: That is '58, is it?

The Witness: 1958, sir. [213]

* * *

BERNARD B. BURNS

resumed the stand as a witness, and having been previously duly sworn, was examined and testified further as follows:

Cross-Examination

By Mr. Ginsburg: [221]

* * *

Q. How long did your investigation of the Dunes Hotel—what period of time, I beg your pardon, did your investigation take place?

A. September 17 and September 18, 1958.

Q. And that is the complete extent of your investigation of the Dunes Hotel, is that correct?

A. Yes, sir. [223]

* * *

Mr. Ginsburg: Mr. Examiner, I would like to object—my first objection and this is to all the exhibits—and that is that they were all taken, all relate to events which purportedly took place before the enactment of the Federal Aviation Act of [270] 1938.

* * *

CHARLES HERBERT LINEBERRY

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McCollam:

Q. Will you state your full name for the record, Mr. Lineberry?

A. Charles Herbert Lineberry.

(Testimony of Charles Herbert Lineberry.)

Q. What is your occupation, sir?

A. Special Agent, Office of Compliance, Civil Aeronautics Board.

* * *

Q. Mr. Lineberry, did you have occasion to investigate Catalina Airlines? A. Yes, I did.

Q. In December of 1958? [286]

A. Yes.

Q. Could you tell us when and where you conducted that investigation?

Mr. Ginsburg: I would like the record to show, your Honor, my usual objection to events, testimony regarding events prior to January 1, 1959.

Examiner Walsh: Very well.

Mr. Ginsburg: Continuing the objection on that basis.

Mr. Bader: And mine, also, Mr. Examiner.

Examiner Walsh: Yes, that may be done. [287]

* * *

(Answer read.) [292]

* * *

You have examined the documents, have you, Mr. Lineberry?

The Witness: Yes.

Examiner Walsh: Proceed from there.

Q. (By Mr. McCollam): Did you take those photographs? A. Yes, I did.

(Testimony of Charles Herbert Lineberry.)

Q. And where did you take them?

A. At the Los Angeles International Airport on December 14, 1958.

Q. At what office, if any, did you take them?

A. Catalina's office, behind the ticket counter.

Q. Who gave them to you?

A. Mr. Dorfer.

Q. Did you have any discussion with Mr. Dorfer with respect to those documents that you have before you? A. Yes, I did. [294]

Q. And what did he tell you they were?

A. He informed me that they were ticket sales reports, and at the time that I examined them the Dunes Hotel tickets were attached to this——

Mr. Ginsburg: Objection.

Mr. Bader: Objection.

Mr. Ginsburg: Move to strike. Not the conversation. He asked you what did he tell you about the documents. I move to strike right now, your Honor.

Examiner Walsh: Let me ask the witness, did he use the term "tickets" or did he use some other designation?

The Witness: He used the words "tickets." [295]

* * *

The Witness: I asked Mr. Dorfer for this document, among others. When he gave these documents to me, he said that those were the Dunes' station agent's reports of ticket sales, and he [296] said that the tickets were attached to this report. [297]

* * *

(Testimony of Charles Herbert Lineberry.)

Q. (By Mr. McCollam): Did I understand you correctly that attached to each one of those station agent reports of ticket sales, there were tour coupon receipts?

A. That was not the way it was told to me.

Q. What was told to you?

A. They were referred to me by Mr. Dorfer as tickets.

Q. All right. Answer the question. Were those tour coupons—all I am asking, is did you take the picture of all of them or did you just take a picture of one of them that went on the thing?

A. I took an example from each group.

Q. That is right. So that with respect to Exhibits OCB-2 through -71, where these tour coupons appear on the lower part of these sales, report of sales that you just took a picture of one of the coupons as a representative thing? Is that correct? [298]

A. Yes. [299]

* * *

Mr. McCollam: That is correct.

I wish to have marked for identification OCB-72 through OCB-121.

Examiner Walsh: They may be so marked.

(Documents referred to as OCB-72 through OCB-121 were marked for identification.)

Mr. Ginsburg: For the record, I would like to state that OCB-72 through -121 all purport to be documents entitled "Passenger Manifest, Catalina Pacific Airline."

(Testimony of Charles Herbert Lineberry.)

Q. (By Mr. McCollam): Mr. Lineberry, will you examine OCB-72 through OCB-121?

A. I have examined them.

Q. Did you photograph those documents, sir?

A. Yes, I did.

Q. Where and when did you photograph those documents?

A. December 14, 1958, at the office behind the Catalina ticket counter at Los Angeles International Airport.

Q. Where did you get those records to photograph, sir?

A. I requested them from Mr. Dorfer and he supplied them to me.

Q. Did you ascertain from Mr. Dorfer how those flight manifests are prepared? Did you find out from him? [300] A. Yes.

Q. And how were they, did he tell you?

A. He told me that the passengers on those flights, their names were furnished through the Dunes Hotel representative and that their name was put on the manifest, to go with the other information shown on the manifest regarding each individual passenger.

* * *

Q. What did Mr. Dorfer tell you about those with reference to the Dunes, if anything? [301]

* * *

(Testimony of Charles Herbert Lineberry.)

Examiner Walsh: I will ask counsel to rephrase his question. Listen closely, Mr. Lineberry.

Q. (By Mr. McCollam): I show you OCB-73 and call your attention—it says on that particular form "Type of Flight, Dunes."

Did anyone tell you that those particular manifests relate to the Dunes flight? A. Yes.

Q. Who was that? A. Mr. Dorfer.

Q. When did he tell you that?

A. December 14, 1958.

Q. Now, is the same true with respect to all of those exhibits that relate to the flight manifests?

A. Yes.

Q. Mr. Lineberry, will you compare OCB-10, which is the ticket sales report sheet from October 12th—I will withdraw that question. Let me see this manifest. Get the sales report for 11-6-58. Now, what is that? You compare OCB-46 with OCB-72, is that correct? A. Correct. [303]

* * *

Q. Did you have any conversation with Mr. Fox or Mr. Dorfer relating to whether or not Catalina acts as the agent for Dunes, or in what capacity Catalina acts for Dunes? A. Yes.

Q. All right. Will you tell us what Mr. Dorfer or Mr. Fox—and identify each one of them—told you about that? [306]

A. I talked primarily with Mr. Dorfer, and he stated that Catalina, Catalina Airlines performs the flights for Dunes Hotel and does certain ticketing and manifesting work for them. Other than that,

(Testimony of Charles Herbert Lineberry.)

Catalina was not involved in the Dunes tour, Magic Carpet Tour. [307]

* * *

Q. Mr. Lineberry, did you have any occasion to interview Mr. David B. Hugh, General Manager of the Catalina Airlines? A. Yes.

Q. Will you tell us when you did that?

A. December 15, 1958.

Q. And where did you do that?

A. At Catalina's offices at 186 North Canyon Drive, Beverly Hills, Los Angeles.

Q. Did you have any conversation with Mr. Hill?

A. Yes, I did.

Q. Will you tell us what that conversation was about?

A. I asked Mr. Hill for a copy of the agreement between Catalina Airlines and the Dunes Hotel. Mr. Hill gave me such a copy of that agreement.

Q. And what else did he give you, if anything?

A. He, also—I should clarify that last answer. He gave me a copy of the agreement which I photographed. I don't [313] mean—what I am trying to say is he didn't give me a copy to keep. He just let me examine a copy. He also gave me a ledger card which had notations on both sides concerning the——

Mr. Ginsburg: I object. As to those documents, let's get them introduced.

Examiner Walsh: Very well. Let the witness finish his answer.

(Testimony of Charles Herbert Lineberry.)

The Witness: He showed me a cash account ledger card.

Mr. Ginsburg: Objection.

Q. (By Mr. McCollam): Just say what he said. He gave you the ledger card, period, that is all?

A. Yes.

Q. I call your attention to what will be marked for identification——

Mr. McCollam: I would like to have marked for identification OCB 130 through 135, and OCB 136 and 137.

(Documents referred to were marked for identification as OCB-130 through -135; OCB 136, 137.)

Q. (By Mr. McCollam): I ask you if you can identify those, Mr. Lineberry? A. Yes.

Q. What are they, Mr. Lineberry?

A. OCB 130 through 135 comprise the agreement which [314] Mr. Hill gave me between Catalina Transport and M & R Investment Company.

Q. What are the OCB 136 and 137?

A. OCB 136 and 137 are the front and back of a ledger card given to me by Mr. Hill, which he explained was the payments received by Catalina for the flights it performed for the Dunes Hotel.

Q. Would you say that that was a sample ledger sheet, or is that the ledger?

A. This is the ledger that he gave me, a photograph of it. [315]

* * *

(Testimony of Charles Herbert Lineberry.)

Cross-Examination

By Mr. Ginsburg: [317]

* * *

Mr. McCollam: Mr. Examiner, before Mr. Ginsburg cross-examines, I would like to have the witness identify what has been marked as OCB-1, which is a picture of the—well, I will [325] have the witness identify it.

(Document handed to the witness by Mr. McCollam.)

Q. (By Mr. McCollam): Mr. Lineberry, did you take that picture? A. Yes.

Q. When and where?

A. December 14, 1958. You can see "Flight Information Board" behind Catalina Ticket [326] Counter.

* * *

DONALD REICHGOTT

was called as a witness and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McCollam:

Q. Mr. Rich, will you state your full name, sir?

A. Donald Reichgott, R-e-i-c-h-g-o-t-t, but I use Don Rich.

(Testimony of Donald Reichgott.)

Q. Are you affiliated with the C-46 Company, also doing business as Trans-Global Airlines and Golden State Airlines? A. Yes. [388]

Q. What is your connection with that organization? A. President.

Q. You are president? A. Yes.

Q. Of what? A. Trans-Global Airlines.

Q. Is that now a corporation?

A. That is a corporation. [389]

* * *

Mr. Ginsburg: We have a stipulation, Mr. Examiner, as to several of the respondents, the identity of them, and their principals. Mr. Rich and Mr. Miller are partners doing business as C-46 Company, one of the respondents in this proceeding. Another respondent in this proceeding is Trans-Global Airlines, Inc., a corporation, which has in the past I believe done business as Golden State Airlines, and the principals in that compay are Donald Rich and Fred Miller, is that correct?

The Witness: That is correct.

Mr. Ginsburg: Is that our stipulation?

Mr. McCollam: That is correct. [390]

* * *

HARRY R. LLOYD

was called as a witness and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McCollam:

Q. Will you state your full name, Mr. Lloyd?

A. Harry R. Lloyd.

* * *

Q. With whom are you employed, Mr. Lloyd?

A. The M & R Investment Company, Inc.

Q. Where? A. Las Vegas, Nevada.

Q. At the Dunes Hotel? A. Yes, sir.

Q. What is your position there?

A. Controller and assistant to the [397] president.

* * *

LOUIS LEROY FUSON

was called as a witness and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McCollam:

Q. Mr. Fuson, will you state your full name and address for the record?

A. Louis Leroy Fuson. [401]

* * *

Q. With whom are you employed, Mr. Fuson?

(Testimony of Louis Leroy Fuson.)

A. Bonanza Airlines.

Q. What position do you occupy with the Bonanza Airlines?

A. District sales manager, San Diego.

Q. Did you ever take the Dunes Magic Carpet Tour? A. Yes, sir, I did.

Q. Could you tell us when you did, Mr. Fuson?

A. September 21, 1959.

Q. Where did you take that tour from?

A. International Airport here in Los Angeles.

Q. How did you obtain passage on that tour?

A. I purchased the tour booklet at the Catalina Pacific counter at the International Airport.

Q. How much did you pay for that, if you did pay anything? A. $24.95.

Q. Where did you board the plane?

A. At International Airport.

Q. Were there any people, other people aboard the plane?

A. Yes, there were; there were two besides myself who boarded here at Los Angeles. [402]

Q. Then where did the plane go, Mr. Fuson?

A. To Burbank.

Q. What happened at Burbank, if anything?

A. An additional group got on, and we proceeded to Las Vegas.

Q. Would you know how many people got on?

A. Roughly 15, or 12 got on in Burbank, and this was according to what the hostess told me.

Mr. Ginsburg: Object and move to strike that as hearsay.

(Testimony of Louis Leroy Fuson.)

Q. (By Mr. McCollam): Approximately how many do you think——

Examiner Walsh: Just a moment.

Read the record, please, Mr. Reporter, the last question and answer.

(The record was read.)

Examiner Walsh: You mean the stewardess on the aircraft?

The Witness: Yes, yes.

Examiner Walsh: Overruled.

Q. (By Mr. McCollam): Then what happened after the people boarded the plane at Burbank, Mr. Fuson?

A. We proceeded to Las Vegas.

Q. What happened, if anything, during the course of the flight?

A. We were served champagne. [403]

Q. When you say you were served champagne, do you mean that you were given a glass of champagne, is that correct? A. Yes.

Q. Were any announcements made on the plane while you were en route? Were any announcements made on the plane while you were en route from Burbank to Las Vegas?

A. Yes, the flying time was announced, but it was inaudible, I didn't get it.

Q. You didn't? A. No.

Q. Did you finally arrive at Las Vegas?

A. Yes.

Q. What happened there, if anything?

(Testimony of Louis Leroy Fuson.)

A. We were told by the hostess to proceed to a limousine which was waiting for us where a host of the Dunes Hotel would give us further instructions.

Q. All right. Did you get on the bus?

A. Yes, I did.

Q. Where did the bus take you?

A. To the Dunes.

Q. What did you do there, if anything?

A. I went in and ate at their Chuck Wagon, and left the hotel shortly after that.

Q. Did you obtain, is that all that you obtained for your flight coupon, for your booklet? [404]

A. No, I procured a bottle of champagne.

Q. What did you do after you obtained the champagne, Mr. Fuson?

A. I returned to the Thunderbird Hotel where I had reservations. [405]

* * *

Q. Now, going back to your procurement of this booklet, you say you procured it at the Catalina Pacific counter? A. Yes.

Q. Did you talk with anyone there?

A. The agent, the ticket counter agent with whom I made the transaction.

Q. Now, can you tell us what you said to him, and what he said to you? [406]

* * *

A. I appeared at the counter two times. First I asked if it was possible to get on the plane to Las Vegas that evening, and he said, yes. I left the

(Testimony of Louis Leroy Fuson.)

counter, and told him that I would probably be back. I returned, oh, approximately five minutes before the flight was to leave, told him that I wanted to take the trip. He gave me the booklet with coupons, I paid him, and walked away from the counter.

Q. Did you make any reservations at the Dunes Hotel? A. No, I did not. [407]

* * *

Q. How did you go about purchasing this booklet? [409]

* * *

The Witness: I told the agent that I wanted to take the Dunes trip, and he asked me if there was one in my party, that was all. I gave him the money, and he gave me the coupon booklet, and I proceeded to the gate to board the flight.

* * *

Q. Mr. Fuson, I show you what has been marked for identification as OCB-141, 142, and 143, and ask if you can tell us what they are. [410]

* * *

The Witness: These are part of the coupons given to me by the agent at Catalina Pacific counter when I told him that I wanted to take the Dunes trip.

Q. (By Mr. McCollam): Now, these are the

(Testimony of Louis Leroy Fuson.)

original coupons that were in the book, is that correct? A. Yes.

Q. OCB-141, 142 and 143, is that correct?

A. Yes.

Q. Now, this 141 says, "Entitles our guest to one cocktail," did you avail yourself of that privilege?

A. I did not.

Q. 142 says, guarantees, "Entitles our guest to a guaranteed show reservation and one cocktail in our fabulous Arabian Room," did you avail yourself of that privilege? [411] A. I did not.

Q. OCB-143 says, "Entitles our guest to limousine service from the Dunes Hotel to airport," did you avail yourself of that privilege?

A. I did not.

Q. I show you now, Mr. Fuson, what has been marked for identification as OCB-144, and it is marked "Customer Copy," and it is numbered as No. 03502, and ask you where you obtained that.

* * *

A. From the agent at the Catalina Pacific ticket counter when I purchased the tour.

Q. Were there other attachments to this?

A. Yes, these other coupons.

Q. What else, do you recall?

A. Well, the one which is used for the flight coupon between Los Angeles and Las Vegas. [412]

* * *

Q. What this booklet contained?

A. Well, there were other coupons, one for the

(Testimony of Louis Leroy Fuson.)

flight between Las Vegas and Los Angeles, the limousine between the airport at Las Vegas and the Dunes Hotel, the buffet coupon, which is good for the Chuck Wagon.

Q. You previously testified that you availed yourself of the Chuck Wagon, is that correct?

A. Yes, yes.

Q. Let me ask you this, Mr. Fuson: Did you return from Las Vegas to Los Angeles on the Dunes Hotel plane? A. No, I did not.

Q. Now, the booklet you testified had a return coupon for air transportation from Las Vegas to Los Angeles. [413] A. Yes.

* * *

Q. What did you do with the return pass that you received in this booklet?

A. I gave it to Mr. Mitchell.

Q. Who is Mr. Mitchell?

A. He is our vice president of traffic and sales, my [414] superior with the company. [415]

* * *

Cross-Examination

By Mr. Ginsburg: [416]

* * *

Q. Were you traveling on business when you went to Las Vegas on the occasion you have testified about?

A. I was instructed by Mr. Mitchell to take the

(Testimony of Louis Leroy Fuson.)

trip, I don't know whether it was business or what it was.

Q. Mr. Mitchell doesn't instruct you what to do with your personal life, does he? A. No.

Q. Mr. Mitchell is your superior, he issues orders pertaining to your business affairs, is that right?

A. Yes.

Q. Did you ever receive the $24.95 that you expended for the Dunes Magic Carpet Tour back from Bonanza Airlines? [417] A. Yes.

Q. Now, when you were at the counter—strike that, please.

Bonanza operates between Los Angeles and Las Vegas, does it not? A. Yes.

Q. You could have flown free at any time between Los Angeles and Las Vegas on Bonanza Airlines, is that right? A. Yes. [418]

* * *

Q. Now, am I correct, Mr. Fuson, the Thunderbird Hotel has a tour arrangement with Bonanza Airlines, is that correct? A. That is right.

Q. That is where you stayed is the Thunderbird Hotel? A. Yes.

Q. As part of that tour arrangement, it is a sort of a combination of air transportation and hotel accommodations, is that right, the passenger or guest pays, or the hotel guest pays an over-all price for air, for the air trip, and for the hotel space, isn't that right?

A. There are two separate transactions. The airline ticket is purchased, and a tour order is purchased.

(Testimony of Louis Leroy Fuson.)

Q. The tour includes the hotel, is that right?

A. That is right. [419]

* * *

Q. They were free with the champagne, weren't they? A. Yes.

Q. How many glasses did you have?

A. Three or four, I don't recall. [421]

* * *

Q. Did Mr. Mitchell know where you would be staying in Las Vegas?

A. I asked him to get me a room at the Thunderbird, yes, he knew where I would be.

* * *

Q. You are absolutely certain the name Dunes didn't appear anywhere on that counter, is that right? A. On the counter?

Q. Any place in the counter area?

A. It appeared on the gate pass, or the folder that I received my coupons in, my tour coupons.

Q. That document identified you as a guest of the Dunes Hotel, is that right? A. Yes. [422]

* * *

Q. Now, what was your first statement to the person behind the counter?

A. I asked him if there were any seats available to Las Vegas on the Dunes trip.

(Testimony of Louis Leroy Fuson.)

Q. You specifically mentioned the Dunes in that connection? A. Yes.

Q. What did he say to you?

A. He said, yes, there was.

Q. Is that the extent of your conversation?

A. Then I said I would like to go, I said I will probably be back, and I walked away from the counter. [423]

* * *

Q. Mr. Fuson, when you returned to the Catalina Pacific counter in the Los Angeles Airport, did you deal with the same agent you had spoken to before?

A. Yes.

Q. What time interval elapsed between your first and second conversations with this agent?

A. I would say between 10 and 15 minutes.

Q. The agent knew who you were, didn't he, he knew you had been at the counter a few minutes before? [427] A. I don't know.

Q. Now, you say you made this report the day following the flight to Las Vegas, is that right?

A. Yes.

Q. I am going to read into the record a paragraph from your report.

"After finishing my conversation with the reservation office I went to the Catalina Pacific counter in the Terminal Building at International and spoke to the agent as to availability of the tour for that particular day. I was told that it would depend on what day I wanted to return. It was necessary for

(Testimony of Louis Leroy Fuson.)

me to tell the agent how many nights I wanted to stay; however, the ticket agent was unable to tell me whether or not rooms were available on any certain day. With this I walked away from the counter saying that I would probably be back." [428]

* * *

Q. At the time of your first inquiry you indicated you were going to stay overnight, is that right?

A. I made no indication at all. I just asked if it were possible to get room reservations.

Q. Room reservations, is that right?

A. Room reservations.

Q. At the Dunes Hotel? A. Yes, sir.

Q. This agent then knew you were interested in rooms at the Dunes Hotel when you came back the second time, is that right, if he remembered you he knew this?

A. If he remembered me, yes, he should have known that.

Q. Now, the hostess also poured out champagne for passengers, tour passengers other than you, is that right? A. Yes.

Q. And, did she, did you see her pouring several glasses for different people, several glasses of champagne? A. Yes.

Q. Did you see anyone refused the champagne?

A. No. Did I, did you say? [429]

* * *

Q. In other words, anyone who wanted more champagne got as much as they wanted?

(Testimony of Louis Leroy Fuson.)

A. Yes.

Q. Now, when you arrived in Las Vegas was anyone there to meet the plane? A. Yes.

Q. Was that a man? A. Yes.

Q. Did he greet the people at the plane?

A. Yes.

Q. Did he escort the people somewhere?

A. From the plane to the limousine.

Q. It is a fact, isn't it, that all the people got in the limousine that were on the plane?

A. I don't know.

Q. Do you know anybody who didn't?

A. No, I don't.

Q. Where did this bus go, or limousine?

A. To the Dunes.

Q. Where else did it go?

A. Well, while I was on it, it just went to the Dunes. [430]

Q. All the people got off, is that right?

A. I don't know, there were people behind me on the bus. I walked into the hotel. I don't know whether they all got off or not.

Q. Excuse me, did you see anyone stay on the bus? A. No, I didn't. [431]

* * *

Q. Can you tell us whether or not this was just a last minute purchase of this tour, just under the gun for the flight, before the flight was closed out?

A. Yes, it was, it was right at their departure time.

Q. Was the agent in a hurry in writing this ticket, tour ticket, and so forth?

(Testimony of Louis Leroy Fuson.)

A. Yes, he was.

Q. Were there any other guests of the Dunes Hotel who were there at the counter being checked in for the flight, or were they all departed by that time?

A. They had left by that time. [433]

* * *

Recross-Examination

By Mr. Ginsburg:

Q. Does Bonanza Airlines have a tour arrangement with the Dunes Hotel? A. No.

Q. Did they ever have one with the Dunes Hotel?

A. I believe we did. I don't know for sure, but I believe we did at one time.

Q. Didn't you receive instructions from someone to discontinue the tour arrangement with the Dunes Hotel? A. Yes, that is right, that is right.

Q. Whom did you receive the instruction from?

A. It was put out in bulletin form, I don't recall whose name was signed. [438]

* * *

Mr. Ginsburg: Mr. Examiner, at this time I would like to make a motion to strike all the testimony of this witness on the grounds that it is beyond the period of the complaint, I make it for the record. After the complaint was filed is what I mean to

say, it relates to periods after the complaint was filed.

Examiner Walsh: The motion is denied. [440]

* * *

DON NIELSON

was called as a witness and, having first been duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. McCollam:

Q. Mr. Nielson, will you state your full name and address for the record, please?

A. Don Nielson, N-i-e-l-s-o-n; 1113 South Third, Las Vegas, Nevada.

Q. For whom are you employed, and, in what capacity?

A. I work for Bonanza Airlines, I am assistant to the executive vice president.

Q. Did there come a time, Mr. Nielson, when you rode or flew on the Dunes Hotel Magic Carpet Tours? A. Yes, there was a time.

Q. When was that? [446]

A. October 22; October 22, 1959.

Q. From where did you depart, and where did you go?

A. I rode from Las Vegas to Los Angeles on a ticket, return portion of a ticket that was originally purchased by Mr. Fuson.

(Testimony of Don Nielson.)

* * *

Q. I show you what has been marked for identification as OCB-144, and ask you if you have seen this exhibit before, Mr. Nielson? [447]

* * *

Q. Have you ever seen this before, Mr. Nielson?

A. Yes, I have, this is the portion that was retained from the ticket that I used.

Q. Where did you get it? [448]

* * *

A. I received it from Mr. Mitchell.

Q. The number on here is what?

A. No. 03502.

Q. What condition was the booklet in when you received it from Mr. Mitchell?

A. It was in the same condition except that it had a return portion ticket attached thereto.

* * *

Q. What did you do, if anything, with that return ticket or pass or coupon?

A. I drove down to the Dunes Hotel, and went inside, and was referred to a Mr. Chuck Mann, who I inquired of as to whether there would be space available. [449]

* * *

The Witness: And I inquired as to whether or

(Testimony of Don Nielson.)

not there was space available on a flight leaving at approximately that time to Los Angeles, and he said, yes, and tore off the coupon, and gave me a gate pass.

Mr. McCollam: I see.

The Witness: And from there I went out and boarded a bus in the front of the Dunes Hotel, which took me to the airport, and I was directed to a C-46.

Mr. Ginsburg: I am going to object unless we identify who is directing him to these places. I would also like the first person identified that directed him to Mr. Mann.

The Witness: It was a lady at the counter, at the reservations desk.

Mr. Ginsburg: At the airport?

The Witness: No, at the Dunes Hotel.

Mr. Ginsburg: Thank you.

The Witness: Mr. Mann himself directed us towards the airplane, he rode the bus out to the field.

Q. (By Mr. McCollam): All right. What did you do after you got to the airport? [451]

A. As I say, then I boarded the C-46, and we went to Los Angeles, we stopped en route at Burbank where several people got off, and then proceeded to Los Angeles. We arrived there I think about 6:00, a little after 6:00 o'clock in the evening.

Q. Now, while you were on the plane, did you notice whether or not there were any other passengers aboard the plane?

(Testimony of Don Nielson.)

A. Yes, there were over 40 that I, that was my estimate, on the airplane at the time, including a number of small children. [452]

* * *

Q. After the plane left Las Vegas where did the plane first land, did you say?

A. Burbank; Burbank, California.

Q. Did you stay aboard the plane?

A. Yes, sir. Several people got off there.

Q. What happened?

A. And then it continued on to Los Angeles International Airport.

Q. What time did you say it arrived there?

A. It was a little after 6:00 p.m.

Q. What did you do, if anything?

A. Well, when I arrived there I walked into the Catalina Pacific ticket counter and inquired of the agent there whether there was a Dunes flight leaving, when the next Dunes flight was leaving for Las Vegas, and he said, right now. And I asked him what the fare was, and he said, it isn't exactly a fare, that it is kind of a package plan depending upon how long you are going to stay. And so I asked him how much it cost, and he said $24.95. And he asked me [453] how long I wanted to stay, and I said, overnight. So, I bought a ticket from him, and he made a motion towards a book, said sign this. And I asked what it was, and he said it was a register.

Q. Did he say what kind of register it was?

A. I don't recall whether he did or not. And I

(Testimony of Don Nielson.)

signed the register, and proceeded to the airplane; it was the same C-46.

Q. Now, just a minute, Mr. Nielson.

I show you, Mr. Nielson, what has been marked for identification as OCB-145, 146 and 147——

Examiner Walsh: Will you mark those for identification, Mr. Reporter?

(OCB Exhibits Nos. 145, 146 and 147 were marked for identification.)

Q. (By Mr. McCollam): ——and ask you to look at them, and tell me whether you can identify them or not?

A. That is the ticket that I purchased at the Catalina Pacific Airlines counter for the return flight. [454]

* * *

Q. Now, is that booklet in the condition it was when you purchased it?

A. No, the flight coupon for the return flight from Los Angeles is missing, as is a coupon for limousine service from the airport to the Dunes Hotel. The stewardess picked that up on the airplane just before we arrived in Las Vegas, that is, the limousine coupon.

Mr. Ginsburg: May the record show that my objection under the best evidence rule is continuing?

Examiner Walsh: Yes, Mr. Ginsburg.

Q. (By Mr. McCollam): Now, these separate little, what is another word for ticket?

Mr. Ginsburg: Coupon?

Q. (By Mr. McCollam): These separate little

(Testimony of Don Nielson.)

coupons that are a part of OCB-145 would indicate a number of privileges, the buffet dinner, one cocktail in the Sinbad Lounge, a reservation, and one cocktail at a show, one bottle of Gold Label Champagne, special Gold Label Champagne, and limousine service from the Dunes, from the airport, I mean, from the Dunes Hotel to the [455] airport, did you avail yourself of any of these privileges?

A. No, sir, I did not.

Q. Now, after you purchased your ticket, I mean, after you purchased the coupon book, what did you do.

A. I proceeded out to the gate that I was directed to, I don't recall the number, the gate number, to board the return flight to Las Vegas.

Q. Well, where did the plane go from Los Angeles, if it went anywhere?

A. After takeoff it proceeded to Burbank California. I think it had about eight people on when it left Los Angeles, and, at Burbank they picked up a few more people, and from there it proceeded to Las Vegas.

Q. All right. What happened after the plane landed at Las Vegas?

A. Well, as I said before, the stewardess had picked up the limousine coupon.

Mr. Ginsburg: I object, this has all been covered before, Mr. Examiner, I thought it had been.

Mr. McCollam: He said about, the stewardess took off, then what happened after the plane——

Examiner Walsh: I think it has.

(Testimony of Don Nielson.)

Q. (By Mr. McCollam): After the plane landed at Las Vegas?

A. As we got off, as I got off the airplane, I was [456] directed towards the bus, the limousine. It was a bus, but, I don't recall, oh, it was Mr. Mann; Mr. Mann was there at the gate to direct us towards this bus, and we got on this bus, and Mr. Mann then inquired as to how long some of the people were going to stay, or had planned on staying, and a few of them——

Mr. Ginsburg: I object, it is hearsay, what these other people might have said.

Q. (By Mr. McCollam): What happened after that, Mr. Nielson?

Examiner Walsh: Sustain the objection.

The Witness: The bus proceeded to the Dunes Hotel, and when I arrived there, why, I got off the bus, and that was the end of the journey. There was no further direction as to where anybody should go. [457]

* * *

Cross-Examination

By Mr. Ginsburg:

* * *

Q. Now, you say you have a report of your investigation in Las Vegas, is that right? [458]

A. Yes, upon my return to Las Vegas I prepared a memo to the excutive vice president.

Q. Where did you live at this time, what city?

(Testimony of Don Nielson.)

A. Las Vegas.

Q. What address did you give to the Dunes Hotel when you took this flight, or to the Catalina person?

A. The address I gave to the Dunes?

Q. Yes, at the Los Angeles International Airport, what address did you give them as your address?

A. I wrote a Wilmington, California address.

Q. It was a false address, is that right?

A. Yes.

* * *

Q. Don't you know that they won't allow a person on that flight unless they are going to be a guest of the Dunes Hotel?

A. Well, that is what they purport, but, of course, I [459] was not a guest of the Dunes Hotel.

Q. If you had given a Las Vegas address, isn't it a fact they wouldn't have let you on that airplane?

A. Well, I don't know.

Q. That is why you didn't give a Las Vegas address, isn't it?

A. I gave a California address to avoid any problems, yes. [460]

* * *

Q. Do you personally object to the Dunes operation? You can answer that "Yes" or "No," if you will. A. Yes.

Q. Now, you have a pass to travel on Bonanza Airlines, don't you? A. Yes, sir.

(Testimony of Don Nielson.)

Q. Bonanza Airlines fly from Las Vegas to Los Angeles? A. Yes, sir. [468]

Q. Fly from Los Angeles to Las Vegas also, Bonanza flies both ways? A. Yes, sir.

Q. You could have flown on that pass, couldn't you? A. Yes, sir.

Q. Instead of that, you paid for this tour ticket, is that right? A. That is correct.

Q. You were reimbursed by Bonanza, is that correct? A. Yes, sir. [469]

* * *

Q. Your notes state that you asked the following question of the person behind the Catalina counter after you had received the coupon book you have identified. Your question is, "What is this?"

Agent's answer, "A guest register."

Is that correct? A. Yes, sir. [470]

Q. And the agent identified the book that you signed as the guest register, is that right?

A. Yes, sir.

Mr. Ginsburg: Mr. Examiner, I would like to have marked for identification as Respondent's Exhibit 2, a document which purports to be a guest register of the Dunes Hotel.

Examiner Walsh: You may mark it for identification as Exhibit No. 2 of the respondent.

(Respondent's Exhibit No. 2 was marked for identification.)

Q. (By Mr. Ginsburg): I show you Respondent's Exhibit 2, for identification, and I ask you if

(Testimony of Don Nielson.)

this is the type of register that you signed, the type of register that you signed?

A. Yes, I believe that is.

Q. Isn't it a fact that the heading is "Guests," the heading of each page? A. Well, yes.

Q. You signed that, is that right, one similar to this?

A. I signed one similar to that, yes.

Q. You gave a false address on it, is that right?

A. I gave an address where I was not living, yes.

Q. Now, you knew, did you not, that you were signing as a guest of the Dunes Hotel?

A. I was merely signing a book, I didn't notice whether [471] it was marked "Guests" or not at the time.

Q. You see this page? A. Yes.

Q. You now remember it was a page just like this, is that right? A. Or similar thereto.

Q. And the top word is "Guests"?

A. On this one it is, yes.

Q. Immediately prior to signing it, you asked the agent what it was, and he said it was a guest register? A. Yes.

Q. You knew it was a guest register?

A. That is what the agent said it was.

Q. You knew, had no reason to believe he was telling you an untruth, did you? A. No.

Q. Whose guest did you know you were at that time?

A. I was no one's guest as far as I was concerned.

Q. You knew when you were signing that book

(Testimony of Don Nielson.)

that you were signing the Dunes Hotel guest register, didn't you?

A. I did not know that it belonged to the Dunes Hotel.

Q. Whose flight were you flying on?

A. The Dunes flight.

Q. Who were you investigating?

A. Dunes Hotel. [472]

Q. Is the Dunes Hotel, is the Dunes a hotel in Las Vegas? A. Yes.

Q. Do they operate an aircraft for their guests?

A. They operate an aircraft between Las Vegas and Los Angeles.

Q. And you got on that aircraft? A. Yes.

Q. You signed a guest register. Now, I will ask you again, whose guest were you when you signed that register?

A. Well, the fact that it is stated as a guest doesn't make you a guest itself.

Q. If you were a guest of anyone, who were you a guest of?

A. I didn't consider myself a guest.

Q. You signed the guest register, you got on the Dunes flight, you are investigating the Dunes, the Dunes is a hotel in Las Vegas, you tell me that you don't know whose guest you were——

A. That register——

Q. ——purporting to be?

A. That register wasn't in the Dunes Hotel, it was in the Los Angeles International Airport.

Q. You knew that that guest register pertained

(Testimony of Don Nielson.)

to the flight you were going to take, didn't [473] you? A. It wasn't stated as such, no.

Q. But you knew it was a condition to your getting on the aircraft, didn't you?

A. He asked me to sign that register, and I signed it.

Q. It was part of your getting on that aircraft and taking that flight, wasn't it?

A. It wasn't stated as such.

Q. You knew that you were signing that aircraft, I mean, that register, that guest register preparatory to getting on that aircraft?

Mr. McCollam: I submit the witness has answered that question several times.

Mr. Ginsburg: I submit he has avoided answering the question, your Honor.

Examiner Walsh: Well, if you have a better answer, Mr. Nielson——

The Witness: I signed the register because I was directed to do so by the agent from whom I bought the ticket, and that was the extent of the conversation, and that is all.

Q. (By Mr. Ginsburg): Did you tell the agent you were coming back to Los Angeles?

A. Yes, I believe I told him that I was going to return, I wished to return the following day.

Q. How many other false representations did you make [474] other than your address and the fact that you were going to return to Los Angeles, to this agent?

(Testimony of Don Nielson.)

A. I told the agent that I expected to return the following day.

Q. You didn't expect to return, did you?

A. No.

Q. And if you did return, you didn't expect to come back on the Dunes Magic Carpet Tour, did you? A. No.

Q. Because you had a pass on Bonanza, isn't that right? A. Well, that isn't the reason.

Q. You were going somewhere else, is that right?

A. I didn't expect to return the following day.

Q. You were just out procuring evidence to testify in this proceeding, weren't you?

A. I was procuring the facts in the hope that it would be useful in stopping the Dunes operation, yes, sir. [475]

* * *

Q. Did you advise Mr. Mann in your conversation that you were not Mr. Fuson? A. No.

Q. You represented yourself to be Mr. Fuson, didn't you?

A. I merely presented the ticket, he didn't ask one way or the other.

Q. Didn't you think Mr. Mann knew or believed that the person handing him the ticket was the person whose name appeared on it?

A. I don't know what he thought.

Q. You didn't bother to clarify his mind on that subject, did you? A. No, sir.

Q. Do you know he would have let you go on that flight if you told him who you were?

(Testimony of Don Nielson.)

A. No, sir, I don't know.

Q. And you in no way indicated that you were not Mr. Fuson to anybody at the Dunes Hotel?

A. No, sir.

Q. Now, when you handed him the ticket, do you have that [477] ticket, tour ticket?

* * *

A. Yes, sir.

Q. And in what form was the ticket when you handed it to him? Were these little coupons identified as 141, 142, 143 on it?

A. No, those were loose, the limousine portion was, return portion on the limousine, from the Dunes to the airport was attached.

Q. Where were those, the other coupons that weren't attached, do you have them?

A. Yes, I had them in my pocket.

Q. In other words, you were trying to pose with Mr. Mann, or to Mr. Mann, that you had been a normal guest of the Dunes Hotel, and you had taken advantage of all the benefits, and [478] you were returning, the only thing left was your limousine service and your return flight on the plane, is that right?

A. You had to remove those portions in order to get to the limousine coupon, it was just a matter of removing those so that the limousine coupon could be detached.

Q. But you detached before you talked to Mr. Mann, didn't you?

(Testimony of Don Nielson.)

A. Well, I think they were already detached. I think that the champagne coupon is in between there, and both of those were also detached.

Q. Why didn't you use these coupons? Don't you like champagne? A. Occasionally.

Q. Why didn't you use it?

A. Well, that particular ticket had no champagne coupon.

Q. Didn't you want a cocktail in the Sinbad Lounge? A. No, sir.

Q. You don't drink, is that right?

A. I didn't choose to drink at that time.

Q. Isn't it a fact that the reason you didn't use these coupons is because you wanted to come back here and testify that somebody could do what you did and not use the coupons, isn't that the real reason?

A. I wanted to testify that a person did not necessarily have to be a guest of the Dunes Hotel in order to use the [479] transportation.

Q. In other words, Mr. Fuson hadn't done a good enough job because he made the mistake of going over there and taking the Chuck Wagon and the Champagne, and you felt you would do a better job, is that right?

A. I felt that I could provide additional information which might be helpful.

Q. You knew that Mr. Fuson had used parts of the Magic Carpet Tour, some of the services and benefits? A. Yes, sir.

(Testimony of Don Nielson.)

Q. You determined not to use any of them, right, except the ones you had to use?

A. Yes, sir. [480]

* * *

Q. You were trying to get anything you could to make them stop performing these Magic Carpet Tours, weren't you, that was your job?

A. I was trying to accumulate the facts in order to prevent them from continuing this [482] operation.

* * *

Mr. Ginsburg: Mr. Examiner, at this time I would like to identify Exhibit R-3, which has been identified previously during the Executive Session. It purports to be a wine list of the Dunes Hotel.

(Respondents' Exhibit No. 3 was re-marked for identification.)

Examiner Walsh: Very well. You are offering it?

Mr. Ginsburg: I am offering it in evidence at this time.

Examiner Walsh: It is received.

(Respondents' Exhibit No. 3 was received in evidence.) [521]

FRED A. MILLER

called as a witness by and on behalf of the Office of Compliance and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McCollam:

Q. Will you state your full name and address for the record, Mr. Miller?

A. Fred A. Miller, 1717 Via Arriba, Palos Verdes Estates.

Q. That is, I assume it is in California?

A. California.

Q. In the Los Angeles area? A. Yes.

Q. Mr. Miller, what is your connection, if any, with the C-46 Company?

A. I am a half owner.

Q. What is your connection, if any, with Trans-Global Airlines?

A. I am a half owner and vice president.

Q. Are Trans-Global Airlines and Golden State Airlines [522] one and the same?

A. One is a DBA.

Q. Does Trans-Global Airlines own any aircraft? A. No.

Q. Does the C-46 Company own any aircraft?

A. No. [523]

* * *

Q. Now, is there anything, any way you can

(Testimony of Fred A. Miller.)

approximate the time, was it in '58, or '59, Mr. Miller? A. I would say in '58.

Mr. Ginsburg: I am going to object to any questioning on any period prior to January 1, 1959, on the grounds there is no charges in this case pertaining to that period.

* * *

Mr. Ginsburg: I mean, the charges are under the Federal Aviation Act of 1959, which does not become effective until January 1, 1959. [525]

Examiner Walsh: Very well. Overruled. [526]

* * *

Mr. Ginsburg: During the off-the-record period, Mr. Examiner, we have agreed on a stipulation which I will read into the record. This pertains to the operation of the CW 20T aircraft N 9514.

Commencing on the first day of April, 1959, the C-46 Company was composed of Mr. Fred Miller and Mr. Don Rich, leased CW 20T Aircraft N 9514 to the Dunes Hotel. The Dunes contracted with Catalina Airlines to operate the Dunes Magic Carpet Tour using this aircraft. However, Catalina was unable to get this aircraft on its operating certificate, therefore, Trans-Global Airlines operated the aircraft on its part 45 operating certificate. Prior to a date late in December, I believe it is the 26th, 1959, payment was made by the Dunes to Catalina. Catalina in turn paid the salaries of

(Testimony of Fred A. Miller.)

the pilots [539] who were employees of Trans-Global, the landing fees, insurance, gasoline, and other operating expenses. Catalina, however, used its own stewardesses and ticket counter.

Commencing late in December, 1959, approximately the 26th, payment was made by the Dunes directly to Trans-Global.

You will get an opportunity to make any changes.

Pending the approval by the Federal Aviation Agency of Catalina's operation of the CW 20T, in other words, it is anticipated that Catalina will obtain this authority, and will resume the operation. It is also stipulated that the ticket counter at Los Angeles Airport is operated by Catalina, and has been, and that Trans-Global has had nothing to do with that operation.

Is that a true and correct description of the facts Mr. Miller, so far as it goes?

The Witness: That is correct.

Mr. Ginsburg: Is that agreeable with you, Mr. McCollam, is that our stipulation, that that is the operation?

The Witness: Mr. Ginsburg, the reason I raised my hand was——

Mr. Ginsburg: Just a moment. As a witness in this proceeding you can't make a statement.

The Witness: You asked me for a correction, didn't you?

Mr. Ginsburg: Do you have any correction you want to make on the statement? [540]

The Witness: The statement was made, I be-

(Testimony of Fred A. Miller.)

lieve, that Catalina operated all the counters, it is only the one counter.

Mr. Ginsburg: At the Los Angeles Airport I said.

The Witness: All right.

Mr. Ginsburg: That is it.

Mr. McCollam: Now, can you add, this is on the record, can you add to that, Mr. Miller, who operates the counter at Burbank?

The Witness: Dunes.

Mr. Ginsburg: Just a minute. I object. That hasn't got anything to do with this issue. We will stipulate that the Dunes operates it, but we are not going to get into matters with Mr. Miller who has——

Are you an employee of the Dunes, Mr. Miller?

The Witness: No.

Mr. Ginsburg: Are you authorized to speak for the Dunes Hotel?

The Witness: No.

Mr. Ginsburg: We have Mr. Miller's qualifications in the record here.

Mr. McCollam: Will you stipulate that the Dunes operates a counter at Burbank?

Mr. Ginsburg: I think that is absolutely ridiculous, will I stipulate to that?

Mr. McCollam: Yes. [541]

Mr. Ginsburg: Yes, I do.

Mr. McCollam: All right.

Could you read back the first part of the stipulation, Mr. Reporter?

(Testimony of Fred A. Miller.)

Examiner Walsh: Yes, read it back.

(Record read.)

Mr. McCollam: Off the record.

Examiner Walsh: Off the record.

(Discussion off the record.)

Examiner Walsh: On the record.

Mr. McCollam: I will stipulate that those are the facts.

Mr. Ginsburg: I am going to address a couple of questions to Mr. Miller.

Cross-Examination

By Mr. Ginsburg:

Q. I show you Exhibit for identification OCB 150, will you look at it please. Will you note there is a column headed non-revenue or non-rev, do you see that on the first page? A. Yes.

Q. Can you state to the Examiner what class or group of persons are permitted to board the aircraft?

A. These are people that are guests of the Dunes Hotel who have not bought, purchased either the overnight tour or the other tour.

Q. In other words, have not purchased the Magic Carpet [542] Tour, is that right?

A. That is right.

Q. Have you given your pilots, the pilots of Trans-Global Airlines any instructions with re-

(Testimony of Fred A. Miller.)

spect to who may be permitted on the aircraft with respect to the flight, just yes or no?

A. Yes, I have.

Q. What are those instructions?

A. I have instructed them not to permit anybody on board the aircraft unless they hold a ticket on the Magic Carpet Tour, or a pass from an employee or official of the Dunes Hotel.

Q. To whom are those passes to be issued to?

A. Only to the guests of the hotel, or to the employees of the hotel.

Q. Have you ever been told by any official of the Dunes Hotel as to who is to be permitted on this aircraft?

A. Mr. Riddle has made that very clear to us.

Q. What has Mr. Riddle said on that subject?

A. "No one is to go on the airplane except guests of the hotel, persons authorized by me, or an official of the hotel."

Q. When you said "by me" whom did you refer to? A. Major Riddle.

Q. To the best of your knowledge and belief, have you and the employees of Trans-Global Airlines followed these instructions precisely to the letter?

A. To the best of my knowledge and [543] belief, yes.

* * *

DAVID HILL

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McCollam:

Q. Would you state your full name and address, Mr. Hill?

A. David Brice Hill, 801 South Longwood Avenue, Los Angeles 5. [561]

* * *

Q. Mr. Hill, what position, if any, do you occupy with Catalina Air Transport?

A. General manager.

Q. Do you hold any office in the corporation?

A. Vice-president. [562]

* * *

Mr. Ginsburg: Mr. Examiner, at this time I would like to read into the record the stipulation between myself, as counsel for, temporary counsel for Catalina, and Mr. McCollam, counsel for the Office of Compliance.

Examiner Walsh: Proceed, Mr. Ginsburg.

Mr. Ginsburg: Thank you, your Honor.

Item No. 1: DC-3 aircraft N33644 and DC-3 N18101—Catalina operated these two aircraft on occasional flights for the Dunes Magic Carpet Tour during the year 1959. These aircraft were operated

(Testimony of David Hill.)

between Los Angeles and Burbank on the one hand and Las Vegas and return. Approximately six such flights were operated during the year 1959.

Catalina was paid between four hundred and four hundred [564] and fifty dollars per flight by the Dunes Hotel.

Item No. 2: During the year 1959 up until December 26, 1959, the Dunes Hotel paid Catalina for the Dunes Magic Carpet Tour flights from Los Angeles and Burbank to Las Vegas and return.

The two aircraft involved were DC-4 aircraft N4043A and CW-20T aircraft N9514C. However, Catalina was unable to get these two aircraft or either of them on its operating certificate.

Catalina did have contracts with the Dunes to operate flights using these aircraft. In view of this situation Catalina had to engage Trans-Global Airlines to perform the flights using these two aircraft on the operating certificate of Trans-Global. Nevertheless, Catalina was paid by the Dunes under its agreements in the sum of $410.00 per flight when using the CW-2 aircraft, and approximately $1,000.00 when using the CW-20T aircraft. In turn, Catalina paid the crews of Trans-Global. Catalina used its own stewardesses and paid them. Catalina paid the operating expenses of the flights including gas, oil and landing fees. Prior to April 1, 1959, Catalina also paid for the maintenance of the aircraft.

Catalina presently is attempting to get the CW-

(Testimony of David Hill.)

20T on its operating certificate and plans to operate this aircraft when this has been accomplished.

Item No. 3: The Dunes made no payments to Catalina for [565] the counter at the Los Angeles International Airport. Instead, payments from the Dunes to Catalina were on a per-flight basis. Catalina made up manifests for the Dunes Magic Carpet Tours at the Los Angeles International Airport.

Item 4: Payroll records of Catalina show that Catalina paid its own personnel who worked at the Los Angeles Airport.

That is the conclusion of the stipulation.

Mr. McCollam: May I have that read back?

Examiner Walsh: Yes.

(Record read.)

Cross-Examination

By Mr. Ginsburg:

Q. Now, have you heard the stipulation read back, Mr. Hill? A. Yes.

Q. Is it true and correct to the best of your knowledge and belief?

A. The only difference which probably isn't an important item, the crews, it states of Trans-Global. There were also crews of Catalina.

Q. And in the case——

A. Paid by Catalina.

Q. The crews of Catalina, they were paid by whom? A. Catalina.

(Testimony of David Hill.)

Q. Was that with respect to the DC-4 [566] aircraft?

A. Yes, only.

Q. That was operated during the months of January, February and March of 1959?

A. That is correct.

Q. Has some disposition be made of the DC-3 aircraft by Catalina?

A. Yes. Catalina no longer has it.

Mr. Ginsburg: Off the record, please.

Examiner Walsh: Off the record.

(Discussion off the record.)

Examiner Walsh: On the record.

Q. (By Mr. Ginsburg): The crews of the CW-20T were the crews of what company?

A. Trans-Global. [567]

* * *

Mr. McCollam: Mr. Examiner, I identify a publication of classified advertisement which has been marked for identification as OCB 151.

(Exhibit OCB 151 was marked for identification.)

Mr. McCollam: These are ads that appear in the Los Angeles Times beginning May 4, 1958, and continuing on through September 6, 1959. The counsel for M & R Investment Company, Mr. Ginsburg, has asked me to stipulate that beginning with June——

Mr. Ginsburg: 26th.

Mr. McCollam: ——June 26, 1959, until the present date, January 20, 1960, all of the ads in the Los Angeles Times advertising the Dunes Magic Carpet flights contain the following legend: The advertising contains the words "For [574] guests of the beautiful Dunes Hotel and Casino only."

Mr. Ginsburg: As it appears in the advertisement for June 26, 1959.

Mr. McCollam: Now, some of the ads have the notation, the legend, "Guests of the beautiful Dunes Hotel and Casino only."

Mr. Ginsburg: Not after that date.

May we go off the record?

Examiner Walsh: Off the record.

(Discussion off the record.)

Examiner Walsh: On the record.

Mr. McCollam: Mr. Ginsburg has asked me to stipulate that beginning June 26th each of the ads——

Mr. Ginsburg: 1959.

Mr. McCollam: ——1959, each of the ads appearing in the Los Angeles Times contain the notation, "For guests of the beautiful Dunes Hotel and Casino only."

Mr. Ginsburg: With respect to the stipulation, it is the same as it appears in the ad for June 26, 1959, July 5, 1959, and all of the ads depicted in this exhibit which occurred after that time, and that is contained in each of the ads in the Los Angeles Times since that date in the same manner as depicted in the advertisement of June 26, 1959;

and with that stipulation, your Honor, I have no objection to the receipt of this document into evidence. Are you offering [575] it?

Mr. McCollam: Yes, except let us take this further stipulation that the ads, the last four clippings of ads that bear the notation for the year 1959, that they appeared prior to when?

Mr. Ginsburg: Well, I am sure they appeared in 1959. These are changed on the thing. It is to '58.

Examiner Walsh: Show the correction of dates.

Mr. Ginsburg: The correction of dates as appears on the original exhibit, the last four, 10/2/59, it is changed to 10/12/58. The one marked 12/7/59 is changed to 12/7/58. The one marked 12/15/59 is changed to 12/15/58.

Examiner Walsh: They have been corrected physically on the record.

Mr. Ginsburg: On the original exhibit they have been corrected, and I have no objection to the receipt of this document into evidence.

I want to reserve my objection, and I do, to the receipt of ads appearing before January 1, 1959, ads bearing dates before that.

Examiner Walsh: Very well. I will overrule your objection on that. OCB 151 is received.

(Exhibit OCB 151 was received in evidence.) [576]

* * *

JACK EISEN

was called as a witness and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McCollam:

* * *

Q. Mr. Eisen, how long have you been employed for the Dunes Corporation?

A. For the Dunes Hotel, sir, it is approximately eleven months. [586]

* * *

Q. In what capacity are you employed, Mr. Eisen?

A. I am the flight director for the guests of the Dunes Hotel.

* * *

Q. What are your duties in connection with that?

A. I make reservations for the guests of the Dunes Hotel, room reservations, make reservations for the Dunes Hotel Magic Carpet Flight Tour. I make reservations for the guests of the Dunes Hotel at the hotel, whether they are driving up, going by train, or other means of transportation.

Q. Where do you do this work?

A. Lockheed Air Terminal in Burbank.

Q. Is that the full extent of your duties, Mr. Eisen?

A. I supervise the counter out at Lockheed

(Testimony of Jack Eisen.)

Air [587] Terminal in Burbank, supervise the making up of the manifests, the checking in of the guests of the Dunes Hotel at flight time.

* * *

Q. Do you also on occasion, Mr. Eisen, is there anything else that you do for——

A. Yes, I check in the passengers, the guests of the Dunes Hotel at flight time, see that they sign the guest book, that they are guests of the Dunes Hotel. [588]

* * *

Q. Mr. Eisen, I show you what has been marked, I mean, I show you a passenger manifest that is dated 3/21/59, on Line 12 of that manifest there appears a notation "NR" "NRSA" then the name of the passenger "Per Lou Griedman."

A. Yes.

Q. Now, can you tell us what the term, I mean, the notation "NR" means? [589]

A. That means no revenue collected. In other words, that passenger, that person, or is that Miss D'Ambrosia.

Q. Yes.

A. Is the guest of the hotel per Lou Friedman. He is the executive for the Dunes Hotel.

* * *

Q. All right. What does "NRSA" mean?

(Testimony of Jack Eisen.)

* * *

The Witness: It is no revenue, the passengers are no revenue passengers, SA, space available.

Q. (By Mr. McCollam): What do you mean by that then?

A. Well, Mr. Friedman who requested the space for this Dunes guest. [590]

* * *

Examiner Walsh: Very well. Do you have something to add to your answer, Mr. Eisen?

The Witness: Yes, sir.

Examiner Walsh: Proceed.

The Witness: Mr. Friedman who is the executive for the Dunes Hotel asked for this guest to be put on an airplane as a guest of the Dunes Hotel, no revenue collected, if I had a seat available for this particular passenger. [591]

* * *

Q. Now, from this manifest itself, where would it appear to you that these passengers were going?

A. We only go one place, to Las Vegas, to the Dunes Hotel.

Q. Does the plane ever come back?

A. From where?

Q. From Las Vegas? A. Yes, sir.

Q. Does it haul passengers back from Las Vegas?

(Testimony of Jack Eisen.)

A. The people we send back up as guests of the Dunes Hotel come back on our flight. [597]

* * *

Cross-Examination

By Mr. Ginsburg: [599]

* * *

Q. Now, with respect to the manifests shown you by Counsel for the Office of Compliance, but limiting your answer to those manifests from Burbank showing a flight from Burbank to Las Vegas, will you state whether or not each of the persons referred to by Mr. McCollam was a guest of the Dunes Hotel, or not?

A. Yes, sir, they all were.

Q. They were all what?

A. Guests of the Dunes Hotel.

Q. Now, Mr. McCollam asked you to explain a notation "NR," which you stated was no revenue, is that correct? A. That is right.

Q. Now, what revenue is absent in the term no revenue, what revenue are you referring to? [602]

A. The revenue for guests of the Dunes Hotel that would pay for their room and the Magic Carpet Flight package.

Q. What aspect of the package would they pay for?

A. The champagne, room reservations, buffet dinner, a bottle of champagne to take home, night

(Testimony of Jack Eisen.)

club show with a cocktail, a lounge entertainment with a cocktail. [603]

* * *

Do you rest your case, Mr. McCollam?

Mr. McCollam: Yes, sir, that is all I have to present in this case.

Mr. Ginsburg: Excuse me, Mr. Examiner, at this time I move to dismiss the proceedings on behalf of the M & R Investment Company d/b/a Dunes Hotel, on behalf of Mr. Don Rich, Mr. Fred Miller, and on behalf of Trans-Global Airlines d/b/a Golden State Airlines, on the grounds there has been no evidence of any violation of Civil Aeronautics Act introduced in evidence in this proceeding, on the grounds that it would be a futile act to continue with the proceeding to put in evidence when no affirmative case has been proved. This is an enforcement case. Under [604] the Administrative Procedure Act, the Office of Compliance has the burden of proof. No proof has been introduced or adduced in this proceeding under which the Examiner could find any of the Respondents guilty of violating any provision of the Act, or the Board regulations.

For those reasons I move at this time on behalf of the named Respondents to dismiss the proceedings.

Mr. McCollam: I think we have demonstrated amply that there are not only have been, but currently are violations of the Federal Aviation Act by the Respondents named herein. We have shown the times and places, and the terms under which they operate. I think we have more than amply filled our

duty to sustain the burden of proof, and I think this motion should be dismissed.

Examiner Walsh: Your motion is denied, Mr. Ginsburg. Will you call your first witness?

Mr. Ginsburg: I call Mr. Shechtman.

STANLEY SHECHTMAN

was called as a witness and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ginsburg:

Q. State your full name for the record.

A. Stanley Shechtman.

Q. You reside in Los Angeles? [605]

A. North Hollywood.

Q. North Hollywood, California? A. Yes.

Q. Mr. Shechtman, have you ever taken the Dunes Magic Carpet Tour to Las Vegas?

A. Yes, I have.

Q. On how many occasions have you taken the tour?

A. Approximately six times, I believe it was.

Mr. McCollam: I didn't hear you.

The Witness: Approximately six times, six different occasions.

Q. (By Mr. Ginsburg): Now, on these occasions have you stayed overnight at the Dunes Hotel?

A. Yes, I have.

Q. On every one of them? A. No. [606]

* * *

(Testimony of Stanley Shechtman.)

Q. Can you state on approximately how many of those six occasions you stayed overnight in Las Vegas when you took the Dunes Magic Carpet Tour?

A. I think it is about twice.

Q. On those occasions where did you stay?

A. At the Dunes Hotel.

Q. On the other four occasions where did you go when you arrived in Las Vegas?

A. Dunes Hotel.

Q. Where did you spend the greater portion of your time? A. Dunes Hotel.

Q. As part of this tour package, were any benefits made available to you, or did you purchase any benefits? A. You mean——

Q. Any services made available to you at the Dunes Hotel? A. Yes, yes, there was.

Q. Will you state what they were?

A. Well, I had the dinner, and went to see the show, and went to the lounge for a drink, and received a bottle [607] of champagne.

Q. Did you also receive limousine service?

A. Yes, I did.

Q. Now, do you know, or, what was your understanding as to whether or not you pay anything for the air transportation on this flight?

A. No, I understand I would buy the package, the services that I just mentioned.

Q. Yes.

A. And the transportation is free.

Q. Do you know who was permitted to travel on these, the Dunes Magic Carpet Flights?

(Testimony of Stanley Shechtman.)

A. Persons that buy the package tour.

Q. When did you last take the Dunes Magic Carpet Tour? A. January 12th.

Q. On that occasion did you purchase anything from the Dunes Hotel? A. Nothing, no.

Q. Did you travel with others on this particular flight?

A. Yes, there were 39 members of a club.

Q. Are you a member of this particular club?

A. Yes, I am.

Q. Now, on each of the occasions when you [608] traveled on the Dunes Magic Carpet Flight, were you required to sign anything at the counter?

A. Yes.

Q. In Los Angeles? A. Yes.

Q. Where did you leave from?

A. Burbank.

Q. What was it that you were required to sign?

A. Guest register.

Q. I will show you a document that has been identified as Respondent's Exhibit No. 2, and ask you if that is the type of register that you signed? Would you open it up and examine it before you answer, please. A. Yes, this is it.

Q. Now, on each of the occasions, limiting your —strike that, please.

Limiting your answer to the year 1959, on each of the occasions when you took the Dunes Magic Carpet Tour, did you sign the book similar to this?

A. Yes, I did.

Q. Did you observe others signing it?

(Testimony of Stanley Shechtman.)

A. Yes. On the last occasion I checked it against my list of club members to make sure they had signed it.

Q. Now, referring to that last occasion, do you know whether—well, strike that. [609]

Did you purchase the Dunes Magic Carpet Tour?

A. No, I did not.

Q. Do you know whether the other people in your group did? A. No, sir, none of them did.

Q. Where did these people go?

A. The Dunes Hotel.

Q. Now, when they arrived in Las Vegas on this occasion, will you state what happened when the plane arrived?

A. Well, there was a bus waiting, and they took us right to the Dunes Hotel.

Q. Did the bus go any other places, to your knowledge? A. No, sir.

Q. Did you pass through the passenger terminal at the Las Vegas Airport? A. No, sir.

Q. Now, did you have baggage with you on this occasion, or not?

A. Well, I did, but, well, some of the other fellows did, some of us stayed overnight.

Q. Were you one of those?

A. Yes. Well, may I change that, I had a bag, but it was a real small one. I carried it with me. It was nothing that I had checked in, or [610] anything.

Q. On other occasions when you stayed overnight at the Dunes Hotel, have you had baggage with you?

(Testimony of Stanley Shechtman.)

A. Yes.

Q. Do you recall what happened to that baggage when you checked in at the Dunes counter in Burbank?

A. At the Dunes counter it was taken to the front of the terminal. We got it at the front of the terminal.

Q. When you checked in to take the flight to Las Vegas, what happened to the baggage, if you recall?

A. Well, they took the baggage at the desk, and we got it at the hotel.

Q. Did you ever see it at the Las Vegas Airport?

A. No.

Q. Now, referring to the occasions before last Tuesday when you went to the, when you took the Dunes Magic Carpet Tour, on each of those occasions did you receive a limousine service from the airport in Las Vegas to the Dunes Hotel?

A. Yes, sir.

Q. On each of these occasions where did the bus go when it left the Las Vegas Air Terminal?

A. To the hotel.

Q. Did it go any other place, to your knowledge?

A. No, sir.

Q. Did you observe whether the other people on the [611] aircraft, were there other people on the aircraft with you on each occasion?

A. Yes, sir.

Q. Can you state to the Examiner whether or not these other people—strike that.

(Testimony of Stanley Shechtman.)

What these other people did when they arrived at the airport in Las Vegas?

A. They all got on the bus. I believe they were checked over at the desk, you know, as they went in, not checked off, excuse me, they were told by some gentleman as they got in, you know, the host, or something, to get in the bus, and they will take them right to the hotel.

Q. To the best of your knowledge, had each of the persons on that aircraft gotten on the bus when you arrived in Las Vegas?

A. To the best of my knowledge, yes, sir.

Q. What happened to these persons when you arrived at the Dunes Hotel on the bus, or limousine?

A. They went into the hotel, that I know of.

Q. Do you know what charge, if any there is for the air transportation on the Dunes Magic Carpet Tour? A. None.

Q. Have you ever been charged for air transportation on the Dunes Magic Carpet Tour?

A. No. [612]

* * *

JOHN C. ALLEN, JR.

was called as a witness and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ginsburg:

Q. Will you state your full name for the record, please. A. John C. Allen, Jr.

(Testimony of John C. Allen, Jr.)

Q. Mr. Allen, by whom are you employed?

A. Catalina Pacific Airlines.

Q. Where do you perform your duties?

A. Los Angeles International Airport, sir.

Q. What is your title?

A. Station manager.

Q. How long have you been employed by Catalina? A. One year.

Q. When did you commence your employment?

A. I believe it was January 12, 1958, about 1959.

Q. Will you state what your duties are at Catalina?

A. I supervise and perform among other things the checking in of Dunes Hotel guests, the handling of their baggage across the counter onto the aircraft, the issuing of Dunes Hotel Tour tickets. It is also a function of [617] myself and my office to ascertain that those boarding the Dunes Hotel Magic Carpet Flight are valid guests of the Dunes Hotel.

Q. Do you have any duties with respect to manifests?

A. Yes, sir, we receive a manifest by phone from the Dunes Hotel office in Burbank, and use that for checking in the passengers.

Q. Do you have any duties with respect to dispatching the flight?

A. Yes, sir, that is also part of my duty.

Q. Now, do you issue any Dunes Magic Carpet Tours, I believe you indicated you did, is that right?

A. Yes.

(Testimony of John C. Allen, Jr.)

Q. Will you explain the procedure for issuing the tour coupons?

A. Well, in most cases, the manifest is called to us by the Burbank office of the Dunes, the names are taken down and typed. The tour that they hold is noted. When the passenger arrives at the ticket counter, if he is not already holding a tour ticket, we will issue one against the particular type of tour that he has.

Q. What type of tours are there?

A. There is the one-night tour, the two-night tour, the three-night tour, and so forth, and an evening tour.

Q. Now, referring to the one-night tour, and two-night [618] tour, and tours for more than two nights, for that matter, where you are issuing the tour coupon book, is the Dunes Hotel guest required to, or does he pay for anything?

A. Yes, he pays for his room, plus the services offered on the tour.

Q. Can you state for the record whether or not there is any charge for the air transportation?

A. There is none.

Q. Now, is there a time when the guest of the Dunes Hotel who is on a one-night tour, or two-night tour, or for more than two nights, is there a time when he must pay for the room at the Dunes Hotel?

A. Yes.

Q. When must he may for it?

A. Prior to boarding the flight.

(Testimony of John C. Allen, Jr.)

Q. Now, do you ever sell the Dunes Magic Carpet Tour to guests of the hotel?

A. Occasionally, very infrequently.

Q. Could you give us any more exact idea of how frequently you might do that?

A. Oh, possibly once a week, something like that, maybe twice; as I said, very infrequently.

Q. Have you ever had a request—strike that, please.

Do you ever receive requests for the Dunes Magic Carpet Tour over the telephone? [619]

A. Occasionally.

Q. Have you ever had a request from anyone for air transportation to Las Vegas that want to purchase it from you? A. Also occasionally.

Q. How have you handled these requests?

A. We would advise the individual making the request that if they wished to be guests of the Dunes Hotel we could refer them to the Dunes Hotel office at Burbank for information and reservations, but that would be the only circumstances under which we would be able to handle it.

Q. Have you ever accepted anyone, or sold transportation to anyone on the Dunes Magic Carpet Tour? A. Transportation as such?

Q. Yes? A. No, sir.

Q. What is your answer? A. No, sir.

Q. Now, you receive inquiries — strike that, please.

Have you ever received inquiries over the tele-

(Testimony of John C. Allen, Jr.)

phone for the Dunes Magic Carpet Tour where the person calling wants a room reservation at the Dunes? A. Yes, sir.

Q. What do you do with those instance?

A. We give them the Dunes Hotel, the number of the [620] Dunes Hotel office here in town, either Burbank Airport or in some cases if it is more convenient for them, the Beverly Hills office.

Q. Now, referring to the summer of 1959, have you ever handled any of those calls yourself rather than referring them?

A. Not calls as such, no.

Q. Well, have you ever had any requests for room reservations at the Dunes in connection with a Dunes Magic Carpet Tour that you handled yourself?

A. Yes, sir, over the ticket counter, occasionally someone would come up and request information.

Q. In those instances have you called the Dunes Hotel?

A. Yes. That is our procedure, we call the Dunes Hotel and ascertain if there is room available at the hotel for the passengers, and if so, if we receive a confirmed reservation, we will reconfirm it to the passenger.

Q. Have there been any other instances where you have been unable to confirm room space?

A. Yes, sir.

Q. When did these occur?

A. Mostly last summer when there was quite a

(Testimony of John C. Allen, Jr.)

bit of business in Las Vegas, primarily over the summer week ends, and so forth. [621]

Q. On those occasions when you could not confirm space, what did you do with the person inquiring at your counter, what did you tell them on those occasions?

A. They were advised that since they were not guests of the Dunes Hotel they could not be accommodated either on the flight or at the hotel.

Q. Did those people board the Dunes Magic Carpet Tour? A. No, sir.

Q. Did you handle these matters that you have just referred to personally? A. I have, yes.

Mr. Ginsburg: I would like to have marked for identification as Respondent's next Exhibit in order, I believe it is 4.

Examiner Walsh: Exhibit 4 is your next number, yes.

Mr. Ginsburg: Two books entitled Dunes Hotel Guest Register. The first book is entitled Dunes Hotel Guest Register, and the second book Hotel Register Guests of Dunes Hotel.

Examiner Walsh: They will be marked for identification.

Mr. McCollam: Would that be Respondent's 4-A and 4-B, for convenience? [622]

Examiner Walsh: Yes, Respondent's 4-A and 4-B for identification.

(Respondent's Exhibits 4-A and 4-B were marked for identification.)

(Testimony of John C. Allen, Jr.)

Q. (By Mr. Ginsburg): Mr. Allen, I show you Exhibit our 4-A and our 4-B, for identification, and ask you to examine them, please. A. Yes, sir.

Q. Can you state for the record what these documents are?

A. These are Dunes Hotel guest registers which were maintained at the ticket counter at Los Angeles International Airport.

Q. Were these registers, hotel guest registers maintained under your supervision and control?

A. Yes, sir.

Q. Now, can you tell me how you used these guest registers, what you do with them?

A. Well, they are placed on the ticket counter at check-in time, and each guest of the Dunes Hotel is required to sign the register prior to boarding.

Q. By looking through these exhibits for identification, can you observe the signatures of the individuals who boarded at the the Los Angeles Air Terminal? [623] A. Yes.

Q. In addition to signing their names, what else did they do?

A. They placed their address, and the date which they boarded is also placed on the page they sign.

Q. Now, have any of the individuals ever inquired as to what this document is before signing it?

A. We have had occasional inquiries, yes.

Q. What have you told the people that made such inquiry?

A. We advise them that since they are guests of the Dunes Hotel, at this point in the tour that they

(Testimony of John C. Allen, Jr.)

are required to sign the Dunes Hotel guest register, and that this is that register.

Q. Now, to the best of your knowledge, has any one person refused to sign these? A. No.

Q. To sign this register?

A. Never had anyone.

Q. Now, Mr. Allen, there is testimony in this proceeding by an individual by the name of Mr. Fuson, I believe, of Bonanza Airlines who testified that in September of 1959, he purchased a Dunes Magic Carpet Tour at the Los Angeles Airport, and he also testified that it was just before the time the aircraft was going to depart. I will [624] ask you if people have ever checked in under those circumstances?

A. Yes, they have.

Q. For the Dunes flight. I will ask you to state for the record whether or not under the circumstances indicated, just before the flight time, that whether or not such people would sign the guest register?

A. They would normally do so, however, it is possible that in haste the last moment, and so forth, we sometimes folded this up and put it away, as we are closing our pouch, and if someone would come to the desk after that, we would overlook having them sign the guest register, yes.

Q. Now, with the exception of cases such as this where you might have overlooked at the last minute having the person sign the guest register, what is your testimony with respect to the guests of the Dunes Hotel signing that register?

(Testimony of John C. Allen, Jr.)

A. They are required to do so, and we require them to do so, and I would say that with very rare exception, except as you brought out, all guests would have signed the register.

Q. Now, Mr. Allen, what group of persons do you accept on the aircraft?

A. Guests of the Dunes Hotel.

Q. Is there any way for you to ascertain whether a person is a guest of that hotel before they board the [625] aircraft?

A. In the circumstances where a passenger is holding room reservations at the Dunes, of course, that is obvious. Also, if they have purchased a tour ticket for activities at the Dunes Hotel, this would seem to indicate it. Also having them sign the guest register, and indicating, that is, a guest register of the Dunes Hotel, and, of course, the tour is advertised as a Dunes Hotel tour.

Q. Is there any restriction that you know of in the advertising?

A. No, none other than the passengers must be guests of the Dunes Hotel.

Q. There is that restriction, is that right?

A. It is my understanding, yes.

Q. Where are the benefits contained in the flight package, where are most of those received?

A. At Las Vegas.

Q. Where? A. Dunes Hotel.

* * *

(Testimony of John C. Allen, Jr.)

Cross-Examination

By Mr. McCollam:

Q. When people make inquiries about signing the register, you say occasionally you have people ask you about [626] it, what is your, what generally happens, you put the person's name on a manifest, and you tell them to sign the book, or what?

A. Well, the manifest is received internally by us over the phone, and then is placed on our ticket counter, and as the passenger checks in we verify the fact that his name is there, the type of tour he holds, whether or not he requires ticketing, handle his baggage, and so on and so forth. When we are about through with that, we request that he sign the Dunes Hotel guest register, which is placed facing him on our ticket counter.

Q. And then occasionally people ask you what it is?

A. They will just say, why do I have to sign this, or something like that.

Q. What do you tell those people, Mr. Allen, if they ask you, do they have to register at the Dunes Hotel?

Mr. Ginsburg: I object, that isn't what they said. The witness has indicated what they say.

Mr. McCollam: I know, but sometimes people might ask you if they have to register at the Dunes Hotel, do they ask you that, these evening tour passengers?

A. I don't know if that is a specific question that

(Testimony of John C. Allen, Jr.)
has been asked me, no. I would feel that generally I were asked, why do I have to sign this book, just in sort of a general area. [627]

Q. (By Mr. McCollam): Is there anything to indicate that this book is maintained at the Los Angeles International Airport?

A. Nothing actually, I have my writing on many pages here, and the heading, and so forth.

Q. You have your writing there, will you show me where your writing is?

A. This would be one of mine here (indicating).

Mr. Ginsburg: Let the record show that the witness is referring to Exhibit R-4-A, dated September 23, 1959, to the heading on that page, where it says, "Guests," and then the date, and written in 9/23/59, the name typed in, and written in the witness' handwriting, Dunes Hotel, is that correct?

The Witness: Yes, sir.

Q. (By Mr. McCollam): Is there any place else on that page that your writing appears?

A. No, sir, no. I just head up each page prior to having the passengers sign it. That is mine also, I believe (indicating).

Q. (By Mr. McCollam): Mr. Allen, barring the incidents where somebody came in at the last minute and you wrote out a ticket, this would be, this register would be a list of all the passengers who boarded the Dunes Flight at Los Angeles International [628] Airport?

A. It should be with some exception, there was just about the time, you see, I don't know if it is in

(Testimony of John C. Allen, Jr.)

this one or not, just about the time I started Los Angeles, about a year ago.

Q. Yes, that would be back in January?

A. January, 1959, it was requested that we at Los Angeles have this guest register filled out. I was not in full charge at that time of the station. The gentleman that was saw fit to disregard these instructions, so that there is a lapse in here because of his disregarding it, that we don't have everything. But when the situation was explained to us, and we recognized it, and so forth, from that point on we have faithfully performed this.

Q. Who was, you say, that explains this to you?

A. It was a gentleman by the name of Ted Parvin that is no longer connected with Catalina Airlines, and was at that time, he worked on Catalina Island, actually, and I was being broken in by him into the position.

Q. So—— A. P-a-r-v-i-n.

Q. We should be able now to pick up most of the names that appear on this manifest that is dated 3/24/59, origination LAX, and destination Las Vegas, is that correct?

A. Depending on the particular date, it may have been [629] when we weren't doing it.

Q. You said you were in charge starting in January, isn't that correct?

A. Yes, but I say that some time after that the situation was brought to our attention and corrected.

Q. All right. Now, when was that?

(Testimony of John C. Allen, Jr.)

A. I would say it was about July of, June or July of 1959.

Q. Prior to that time then this book——

A. Was somewhat spotty, yes, it is not an accurate record.

Q. I notice the dates go from, well, this book appears to have been started on January 19, 1959, is that correct? A. Yes.

Q. And the date when the people registered in this book was January 18, 1959, can you explain to me why the book was started a day after the people signed it? A. No, I can't.

Q. You don't know that? A. No.

Q. Now, the next date is January 30, that is part of the spottiness that you were talking about, is that right? A. That is correct, yes.

Q. Then there is a skip from February 3rd [630] through February 9th.

Mr. Ginsburg: Object to that, there is a skip after February 3rd until February 8th, if we are going to put it in the record, let us put it in the way it is.

Examiner Walsh: Let us check it for accuracy.

Mr. McCollam: I read it nine, Mr. Ginsburg, are you right, or am I right?

Mr. Ginsburg: You said there is a skip from February 3rd through January 9, there is an entry here for the 3rd of February, there is an entry here for the 9th of February. If there is any omission, it is between those dates.

(Testimony of John C. Allen, Jr.)

Mr. McCollam: You have made it very clear, Mr. Ginsburg.

Mr. Ginsburg: That was my objection.

Examiner Walsh: Your answer to that was yes?

The Witness: Yes.

Q. (By Mr. McCollam): The next entry is the 16th? A. Yes.

Q. Do you recall whether or not there were any passengers between——

A. I would assume there were passengers.

Q. I show you the page that is dated July 8th, 1959. A. Yes. [631]

Q. And I show you the reverse side of that page, and it looks to me as if it is July 2nd, 1959.

A. Well, there is a possibility, let's see, there is a possibility then when this goes from 6/23 here to 7/2, there is a possibility that someone may have turned over two pages instead of one when they started the second, and then we discovered the error, and we went back and filled that in.

Q. I see. But from June 23rd your next entry you see is——

A. No, actually the second of——

Q. And then go back to pages of July 6th?

A. Yes.

Q. Then the next page is July 8th?

A. That is right.

Q. Then we come to July 2nd. Can you tell me when this book started to be kept?

A. I would say right in this area, from probably the 6th of July on would seem to be most accurate

(Testimony of John C. Allen, Jr.)

time. 12, 13, 13, 14, 15. As I said, this was when we were first apprised of the importance of this, and a definite point was made to my office about it, and I myself and my office understood the importance of it, and we kept it henceforth.

Q. When did you understand the importance of it, that is what I want to get, is there any way you can tell [632] from here?

A. I would say at the point wherein we started to keep the record accurately, that would be the best of my recollection.

Q. Did anyone in impressing the importance to you, tell you that a complaint had been filed by the Civil Aeronautics Board?

A. No, sir, not to my recollection.

Q. No one told you?

A. Not to my recollection, no.

Q. I want to make sure of this, nobody told you anything about a complaint that was filed on June 15, 1959, against the M & R Investment Company and the Catalina Air Transport, nobody told you anything about that? A. I don't recall it.

Q. But it is your testimony though that it was impressed upon you about July?

A. I would say possibly July 5th or 6th.

Q. July 5th or 6th this book had to be kept right up, is that right? A. That is right. [633]

* * *

(Testimony of John C. Allen, Jr.)

Redirect Examination

By Mr. Ginsburg:

Q. Now, prior to July 6, 1959, when you stated that you vigorously registered each of the guests of the Dunes Hotel, and had them sign this register book, what kind of terms were the personnel in your office on with the Dunes Hotel personnel?

A. At the time I took over the station in January they were on particularly good terms individually among themselves, the personnel of the station.

Q. Can you state how you and the other personnel, let's say regarded the registration of the guests of the Dunes Hotel in the hotel register book at the Los Angeles Air Terminal, what type of a duty you regarded that as?

A. Unnecessary and somewhat of an inconvenience, I would say.

Q. And then commencing in June or July of 1959, has your attitude on that matter changed?

A. Yes. [640]

* * *

JACK EISEN

resumed the stand, having been previously duly sworn, and testified further as follows:

Further Direct Examination

By Mr. Ginsburg:

Q. Now, Mr. Eisen, you previously testified regarding your duties and employment, however, I am going to ask as best you can, the date you were first employed by the Dunes Hotel?

A. I would say approximately March 15, of 1959.

Q. You have been employed continuously by the Dunes Hotel since that time? A. Yes, sir.

Q. Now, will you state for the record, Mr. Eisen, who is eligible to board the Dunes Magic Carpet Flight? A. Just guests of the Dunes Hotel.

Q. You undertake to ascertain whether persons seeking to board that flight are guests of the Dunes Hotel? A. Yes, sir.

Q. And your duties and activities are limited to what area? [642] A. Los Angeles.

Q. And in particular where do you perform your duties? A. Burbank.

Q. Now, can you state for the record so there is no——

Well, at this time, Mr. Examiner, I would like to have marked for identification what purports to be a Dunes Magic Carpet tour booklet as Respondent's Exhibit No. 5, for identification.

Examiner Walsh: It will be so marked.

(Respondent's Exhibit No. 5 was marked for identification.)

(Testimony of Jack Eisen.)

Q. (By Mr. Ginsburg): Mr. Ginsburg, I show you Respondent's Exhibit No. 5, for identification, and ask you to examine it, please. Have you examined Respondent's Exhibit No. 5? A. Yes, sir.

Q. Will you state, no, strike that, please.

Is this a Dunes Magic Carpet tour book of coupons? A. Yes, sir.

Q. Now, will you state for the record, Mr. Eisen, what the Dunes Magic Carpet tour comprises or includes?

A. It includes the limousine service, buffet dinner, one cocktail in the Sinbad Lounge, guarantee show reservation, and one cocktail. [643]

Q. Anything else?

A. The limousine service back to the airport in Las Vegas, baggage handling, and a front desk receipt to show that the room is paid for.

Q. Now, does the tour also include any benefits that are given on board the aircraft?

A. Pardon me?

Q. Was anything furnished to the passenger?

A. Champagne en route.

Q. What is the cost of this tour, Mr. Eisen?

A. The evening tour $29.95 on Fridays, Saturdays and holidays, and $19.95 Sunday through Thursday.

Q. Now, that $29.95 charge, of that charge is there any charge imposed for air transportation?

A. None at all, sir.

Q. Now, Mr. Eisen, is one of your duties to as-

(Testimony of Jack Eisen.)

certain that people purchasing the Dunes Magic Carpet tour in fact are guests of the Dunes Hotel?

A. Yes, sir.

Q. How do you go about ascertaining that, Mr. Eisen?

A. By phone conversation with the guest when he calls up for his reservation, and if a reservation is made he either comes out to the Lockheed Air Terminal in Burbank, or in Beverly Hills, the Beverly Hills office and picks up his tickets, or he picks them up, if it is inconvenient [644] for the guest to pick up his ticket prior to boarding his flight, he will mail in the check, or pick it up the day of the flight.

Q. Now, are some of the guests, do some of the guests remain overnight in Las Vegas?

A. Yes, sir.

Q. Now, in connection with the guests who are going to remain overnight, are there any conditions attached to their purchasing the Dunes Magic Carpet tour?

A. Yes, sir, he has to purchase a room for the evening at the Dunes Hotel.

Q. Is there a time when this room must be paid for? A. Yes, sir.

Q. When is that?

A. Before leaving the airport.

Q. Is that before or after, or during, or when is it in relation to the time of the flight?

A. When he checks in for his flight.

Q. Is it before, during or after the flight?

A. Before.

(Testimony of Jack Eisen.)

Q. Now, you also have tours which do not include a room, overnight room reservation, or room at the Dunes Htel? A. That is right.

Q. What do you call those tours?

A. The Magic Carpet Evening Tour. [645]

Q. Now, will you state for the record what means you have of ascertaining that persons requesting or obtaining that tour are guests of the Dunes Hotel?

A. They have seen our ads in the newspapers where it shows that only guests of the Dunes Hotel are permitted to purchase that evening tour package.

Q. Yes.

A. They are told that when they called in for reservation, they accept the ticket with that understanding, they sign the guest register book that I have our on the counter before checking in for the flight.

Q. Now, will you state in this connection where the benefits, or some of the benefits that you have referred to are available to persons who have acquired the Dunes Magic Carpet Tour, and I show you Respondent's Exhibit 5 in that connection?

A. The guests receive this ticket upon payment of the Magic Carpet Tour. They receive all the benefits indicated on the ticket.

Q. Where do they receive the buffet dinner?

A. At the Dunes Hotel in Las Vegas.

Q. Where to they receive the cocktail in the Sinbad Lounge? A. Dunes Hotel in Las Vegas.

Q. Where do they receive, where do they see a show, [646] and have a cocktail in the Arabian

(Testimony of Jack Eisen.)

Room? A. Dunes Hotel in Las Vegas.

Q. Where do they receive the Dunes special gold label champagne?

A. At the Dunes Hotel in Las Vegas.

Q. Where do they obtain the limousine service from the Dunes Hotel to the Las Vegas Airport?

A. At the Dunes Hotel in Las Vegas.

Q. Now, I ask you with respect to Respondent's Exhibit 5, is this the type of tour booklet or ticket that you used in connection with the Magic Carpet Tour? A. That is the only one I know of.

Q. And it is that, is that right?

A. That is right.

Q. Is it currently in use?

A. Yes, sir. [647]

* * *

Q. Now, Mr. Eisen, in connection with your duties at the Lockheed Air Terminal, do you receive inquiries over the telephone, calls over the telephone? A. Yes, sir.

Q. Have you ever received an inquiry from someone who had a reservation, room reservation at the Dunes Hotel, and who requested free air transportation, but, without purchasing the Dunes Magic Carpet Tour? A. No, sir.

Q. Have you ever heard of any such an inquiry?

A. Yes, sir.

Q. From whom did you hear it?

A. From Miss Stein in our Beverly Hills office.

Q. Miss Stein in the Beverly Hills office. When did Miss Stein contact you about this?

(Testimony of Jack Eisen.)

A. I believe it was about the beginning of December.

Q. Of what year? A. Of '59.

Q. What did Miss Stein say to you at that time?

A. She had a guest who said he had a room reservation [648] at the Dunes Hotel, and wanted to go up on our flight and go to the Dunes Hotel as a guest without purchasing the evening tour package.

Q. What did you say to Miss Stein on that occasion?

A. I told Miss Stein to check with our reservation office at the Dunes Hotel in Las Vegas, and if they are holding a room for this gentleman or woman or whoever it might have been, and if it is a paid reservation, confirmed in Las Vegas, that we will accept them on our flight as a guest of the Dunes Hotel.

Q. Now, have you ever had an inquiry from anyone requesting air transportation to Las Vegas?

A. Yes, sir.

Q. Have you received more than one of these inquiries? A. We have had a few, yes, sir.

Q. Do you have any policy with regard to such inquiries? A. Yes, sir.

Q. What is that policy?

A. We tell the person calling us, if it is on a phone, we give them a phone number which is Lockheed Air Terminal switchboard Thornwall 2-5231 and ask for Pacific Airlines, TWA, United and Western who do sell transportation to Las Vegas.

(Testimony of Jack Eisen.)

We don't sell transportation. We suggest they call the airline that sells transportation.

Q. I will ask you, Mr. Eisen, whether you have ever [649] accepted anyone for transportation, anyone on the Dunes Magic Carpet Tour who was merely seeking transportation to Las Vegas, as best you know? A. Absolutely no.

Q. Can you state, Mr. Eisen, where the Dunes Magic Carpet Tour can be purchased, what area?

A. Los Angeles, sir.

Q. Can it be purchased in Nevada, in Las Vegas?

A. No, sir. [650]

* * *

Q. Mr. Eisen, I show you Respondent's Exhibit No. 2, for identification, and ask you to examine it?

A. Yes.

Q. I show you Respondent's Exhibit 6-A, B and C, for identification, and ask you to examine those also, have you examined those exhibits, Mr. Eisen?

A. Yes.

Q. Will you state what these four exhibits are?

A. These are the official guest registration books for the Dunes Hotel.

Q. Where are they maintained?

A. Lockheed Air Terminal in Burbank.

Q. Are they maintained under your supervision and control? A. Yes, sir.

Q. Do you make any use of these books, these guest registration books in connection with your duties at the Lockheed Air Terminal?

(Testimony of Jack Eisen.)

* * *

The Witness: Yes, they are part of the checking in of the passenger when he checks in at the counter, he signs the official guest register book. [651]

Q. (By Mr. Ginsburg): Will you just describe when the register book is made available, or given to the guest for signature?

A. It is out on top of the counter, the minute he comes up to the counter, and we ask him his name, and see that he is on our flight, and we ask him to sign the guest register book.

Q. Is there any sign maintained on the counter which pertains to these books? A. Yes, sir.

Q. What does that sign state?

A. All guests must sign register book.

Q. Have any guests ever asked why, or what that book is?

A. Well, the sign actually tells them, and they will ask while they are signing their name.

* * *

Q. Has any guest ever asked what this book, guest register book is, that you can recall?

A. No, sir.

Q. Have you ever had a guest who refused to sign this [652] book? A. No, sir.

Q. What part or portion of the guests do sign this book? A. All of them.

Q. Now, is that true during the entire course of your, during the entire time of your employment

(Testimony of Jack Eisen.)

with the Dunes Hotel? A. As far as I know.

Q. Have you given instructions to the—do you have people working for you? A. Yes, I do.

Q. How many people work for you?

A. Two.

Q. Do you give them any instructions with respect to these books? A. Yes.

Q. What are they, what are the instructions?

A. That all guests must sign the guest book.

Q. Now, Mr. Eisen, from whom do you take instructions or orders? A. Mr. Riddle.

Q. Mr. Major Riddle? A. Yes, sir.

Q. President of the Dunes Hotel? [653]

A. Yes, sir.

Q. Has Mr. Riddle ever given you any orders or instructions with respect to the Dunes Magic Carpet Tours? A. Yes, sir.

Q. Has Mr. Riddle ever stated to you who is eligible to take the Dunes Magic Carpet Tours?

A. Yes, he has.

Q. What did Mr. Riddle say to you in that connection?

A. Just guest of the Dunes Hotel only.

Q. When did Mr. Riddle give you those instructions?

A. The first day I ever met Mr. Riddle when I was hired.

Q. Where did that conversation take place?

A. That was at the Beverly Hilton Hotel in Beverly Hills.

Q. Did Mr. Riddle indicate to you, or did Mr.

(Testimony of Jack Eisen.)

Riddle state to you why only guests of the Dunes Hotel may be admitted to these flights?

A. Yes, sir.

Q. What did Mr. Riddle say?

A. He explained the situation to me, that it is a losing proposition, and only guests of the Dunes Hotel are entitled to be the guests on our flights.

Q. What did Mr. Riddle say was a losing proposition?

A. The package that we sell to the guests [654] of the Dunes Hotel.

Q. Did Mr. Riddle say why this service was offered since it apparently is operated at a loss?

A. Well, it was a convenience for the guests of the Dunes Hotel.

Q. Now, to the best of your knowledge, are the books that you have in front of you which have been identified as Respondent's Exhibit 2; 6-A, B and C, to the best of your knowledge, are these all of the Dunes registers which have been maintained at the Lockheed Air Terminal?

A. As far as I know up to the time, up to the present time since I started.

Q. What is done with these Dunes Hotel guest registers after they have been completely filled out?

A. They are kept on file as an official record for the Dunes Hotel.

Q. Now, do any of the Dunes Magic Carpet tour guests have luggage when they come to the counter at Burbank? A. Yes, sir.

(Testimony of Jack Eisen.)

Q. Can you say for the record how their luggage is handled?

A. When the guests arrive at Burbank, either carrying their own luggage or they may have the redcap service that brings it over, we put it on the scale, see if the guest is a registered guest at the Dunes Hotel. We take his [655] baggage and we give him the baggage tag, and the baggage is tagged and put on the baggage cart to be boarded on the flight.

Q. Do you know where the baggage is placed on the flight? A. Yes, sir.

Q. Where?

A. In the baggage compartment of the airplane.

Q. Is that separate from the passenger compartment? A. Yes, sir.

Q. Now, are these guests permitted to carry on baggage or luggage?

A. No, sir, just cosmetic case perhaps, but it is all weighed in.

Q. In addition to guests who may be traveling on the flight, persons who may be on the flight, is anything else carried on the Dues Magic Carpet Tour, or has anything been carried from time to time?

A. Yes, sir.

Q. What else?

A. Well, we have had costumes, sheet music, turkeys, we had purses sent up.

Q. Where were they sent to?

A. To the Dunes Hotel.

(Testimony of Jack Eisen.)

Q. Are all of these items that you referred to, have [656] they all been sent there?

A. Yes, sir, it all belongs to the Dunes Hotel.

Mr. Ginsburg: Mr. Examiner, I would like to have these designated as Respondent's Exhibit No. 7 for identification what purports to be a passenger manifest dated January 10, 1959.

(Respondent's Exhibit No. 7 was marked for identification.)

Mr. McCollam: I have seen it, Mr. Ginsburg.

Q. (By Mr. Ginsburg): Mr. Eisen, I show you Respondent's Exhibit No. 7, for identification, and ask you to examine it, please.

Have you examined it, Mr. Eisen?

A. Yes, sir.

Q. Will you state for the record what this document is, please?

A. It is the manifest for the flight of Sunday, January 10th, 1959.

Q. Is that the Dunes Magic Carpet Tour?

A. Yes, sir, it should be 60 rather.

Q. 1960. This document is, well, is this the right date on the document? A. No, sir.

Q. What is the correct date?

A. January 10, 1960.

Q. When was this particular flight [657] operated? A. Sunday, January 10, 1960.

Q. Was this manifest prepared under your direction and supervision, Mr. Eisen?

A. Yes, it was.

(Testimony of Jack Eisen.)

Q. Is it true and correct to the best of your knowledge and belief? A. Yes, sir.

Q. Now, Mr. Eisen, do you have any, do any part of your duties cause you to be in contact with Catalina Air Transport at Los Angeles International Airport? A. Yes, sir.

Q. Can you state what your duties are which concern Catalina Air Transport?

A. Yes, sir. We type our manifests. We have passengers boarding at Catalina Pacific Airline counter at Los Angeles International Airport, and we call in the manifests of the guests of the Dunes Hotel that are checking in at their counter, and we give them all the names. And, if it is an evening tour, one-night tour, two-night tour, or a three-night tour, whatever it might be, and they have all that information when the guests check in at their counter.

Q. Now, where in Los Angeles is the Dunes Magic Carpet Tour sold, to the best of your knowledge?

A. At the Beverly Hills office and at Lockheed Air [658] Terminal in Burbank.

Q. Is it sold at Catalina counter at Los Angeles Airport?

A. No, sir, we don't have any salesmen there at all.

Q. Is it possible under some circumstances that it might be sold there? A. Yes.

Q. Would you relate what those circumstances are?

(Testimony of Jack Eisen.)

A. If they had somebody that walked up to their counter and asked about the Dunes Magic Carpet Flight Tour, they will call me on the phone at Burbank and ask me if we can accommodate this particular person who is checking on a reservation to go to the Dunes Hotel, and I will give them a yes or no answer, and give them all the information, or they will have the guest call me on the phone, or hand the phone to him and let him talk to me about it, and I will then in turn talk to either Jack Allen or whoever might be at the Catalina Pacific Airline counter, and tell them exactly how to handle it.

Q. Is your business with the people at the Catalina counter at the Los Angeles International Airport, is it ever concerned with room reservations at the Dunes Hotel?

A. No, sir, they have nothing to do with it at all. [659]

* * *

Q. What travel agency in Los Angeles can get through you free transportation for people that it has made reservations at the Dunes Hotel for? [666]

A. Is that room reservations, sir, that you are pertaining to?

Q. Room reservations, yes.

A. Anybody can get free transportation to the Dunes Hotel in Las Vegas if the guest has a confirmed room reservation in Las Vegas. [667]

* * *

(Testimony of Jack Eisen.)

Q. There aren't any restrictions on these evening tour passengers coming back several days later, are there any restrictions?

A. Yes, sir. When we sell the evening tour, we show the return as the following morning.

Q. You have a reminder on your ticket which says——

A. Well, the ticket actually shows return date.

Q. I mean, on the coupon, I won't use the word ticket?

A. We show the return date on it, when someone shows the evening tour, we show the return the following [673] morning at 3:00 a.m., and they are supposed to come back.

Q. It says on there also, failure to return on the above-return date automatically places you on a space available basis, isn't that correct?

A. That is correct, sir.

Q. The people can come back, can they not, on a space available basis?

A. If there is space available, I presume. I don't have anything to do with that end of the tour, sir. I just get them up there on my flight package, and I show the correct information on the ticket, on the Magic Carpet Flight ticket. [674]

* * *

(Testimony of Jack Eisen.)

Redirect Examination

By Mr. Ginsburg:

Q. Mr. Eisen, what instructions do you give to your employees regarding the guests of the Dunes Hotel signing the guest register?

A. That every guest that checks in for the package must sign the guest book. It is as important as collecting their money.

Q. You tell that to the people who work for you, is that right? [678] A. Yes, sir.

Q. And, from time to time, do you check to see if they are fulfilling their responsibilities with respect to the guest register?

A. Yes, sir, I stand out there and watch it closely.

* * *

Q. Now, Mr. Eisen, I ask you who, what individual employed by the Dunes Hotel maintains the Dunes Hotel registers which are identified as Exhibits R-2 and R-6?

A. The Burbank office of the Dunes Hotel.

Q. Who is in charge of that office?

A. I am, sir.

Q. Do you maintain these books?

A. Yes, sir.

Q. Do you retain them as official records of the Dunes Hotel? A. I do. [679]

* * *

(Testimony of Jack Eisen.)

Now, if you determine that a person has a confirmed reservation to the Dunes Hotel, did I understand you to testify that you will provide him free transportation between Los Angeles and Las Vegas without having to buy the tour?

The Witness: If it is confirmed in Las Vegas at the Dunes Hotel. [680]

* * *

Further Recross-Examination

By Mr. McCollam:

Q. Well, I have just one question, Mr. Examiner, and that is this, you say you will provide the free transportation to people who have made reservations at the Dunes Hotel for rooms, but, as a matter of fact, you have only on one occasion done that, isn't that correct?

A. That is all, yes, sir. [681]

* * *

Examiner Walsh: Exhibits Respondent's 5 and Respondent's 7 for identification are received.

(Respondent's Exhibits No. 5 and No. 7 for identification were received into evidence.)

* * *

Mr. Ginsburg: With respect to Exhibits No. 2, for identification, Nos. 6-A, B and C, I will attempt to enter into a stipulation with Counsel for

the Office of Compliance so that it won't be necessary to introduce these physically in evidence because of their bulk, and because they are official records of the Dunes Hotel. I want to retain them. The same is true with respect to the exhibits identified this morning as Exhibits R-4-A, and [682] R-4-B. I haven't attempted to offer those because of the bulk, and the fact we do want to retain these original records, and duplicating them would be quite a burden.

Examiner Walsh: Yes, you can do that before the close of the hearing.

Mr. Ginsburg: Yes. For all intents and purposes, is there any objection to the receipt of these documents in evidence, I wish you would make them now?

Mr. McCollam: No.

Mr. Ginsburg: Fine. I will withhold the offer.

Mr. McCollam: If we can't make out, I don't think we will have any trouble making out a stipulation, Mr. Ginsburg, but, as of the present time, you are submitting them in evidence, and I have no objection to them being offered in evidence. [683]

* * *

MAC NEISEN

was called as a witness and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ginsburg:

Q. Will you state your full name for the record, please.

A. Mac Neisen, M-a-c N-e-i-s-e-n.

Q. Do you live in the Los Angeles area, Mr. Neisen?

A. I live in the Orange County area.

Q. In California, is that right?

A. Yes, sir.

Q. Are you acquainted with the Dunes Magic Carpet Tour? A. Yes, sir, I am.

Q. Have you ever taken the Dunes Magic Carpet Tour? A. Yes, I have.

Q. When did you last take it?

A. December 30, 1959.

Q. Did you, as a part of that tour, travel by air from somewhere in the Los Angeles area to Las Vegas? [684] A. Yes, I did.

Q. Where did you leave from, Mr. Neisen?

A. I left from Burbank.

Q. Now, Mr. Neisen, on that occasion who were you traveling with at that time?

A. I was traveling with my wife.

Q. When you went to the Lockheed Air Terminal in Burbank were you, or, was your wife shown a hotel guest register?

(Testimony of Mac Neisen.)

A. She was shown a register, and asked to sign it.

Q. Was that in your presence?

A. Yes, it was.

Q. I show you Respondent's Exhibit No. 6, for identification, and ask you if this is the type of book that was shown to your wife on that occasion? A. Yes.

Q. Where was it? Where did you see it?

A. On the front counter.

Q. Was there a sign anywhere near it that you recall? A. I don't recall.

Q. Now, I refer you to a page in this book identified as Respondent's 6-C, with the date in the left-hand column December 30, 1959, and I will ask you to look four lines down, and will you state for the record what name appears there? [685]

A. Mr. and Mrs. Mac Neisen.

Q. Do you recognize the handwriting on that page? A. I do, sir.

Q. Whose handwriting is it?

A. My wife's.

Q. Is there an address shown?

A. Yes, there is.

Q. Is that your address?

A. Yes, it is, sir.

Mr. McCollam: What is the address?

Q. (By Mr. Ginsburg): Now, did you travel on this aircraft to Las Vegas, that is, a part of the Dunes Magic Carpet Tour? A. Yes, sir.

Q. Your wife was with you, is that right?

(Testimony of Mac Neisen.)

A. Yes, sir.

Q. When you arrived in Las Vegas at the airport, will you tell us what happened?

A. We were taken in the limousine to the hotel.

Q. Did you board the limousine?

A. Yes, we did, sir.

Q. Where did the limousine go?

A. To the hotel.

Q. To your knowledge, did it go anywhere else?

A. To my knowledge, no, sir. [686]

Q. What did you do when the limousine got to the hotel?

A. I went in to check into the hotel.

Q. Your wife was with you, I take it?

A. Yes.

Q. Did you at some time along the line receive your baggage? Did you have baggage?

A. Yes, I did.

Q. Going back to the Lockheed Air Terminal, did you do something with that baggage there?

A. I checked it into the office.

Q. When did you next see it?

A. At the hotel.

Q. What hotel is that, please?

A. The Dunes Hotel.

Q. Now, did you stay overnight in Las Vegas on this occasion? A. Yes, I did.

Q. How long did you stay overnight?

A. Four days.

Q. At what hotel did you stay?

A. At the Dunes.

(Testimony of Mac Neisen.)

Q. And when with relation to the time of the flight did you pay for your hotel reservation, your room reservation?

A. My room reservation was prepaid. [687]

Q. It was before the flight, is that right?

A. That is right.

Q. When did you first, how did you first learn of the Dunes Magic Carpet Tour, Mr. Neisen?

A. At one time when I was guest of the hotel.

Q. What hotel was that, please?

A. The Dunes Hotel.

* * *

Q. * * * What do you understand the price of the air transportation of the Dunes Magic Carpet Tour to be? A. None.

Q. Do you know who is eligible to travel on the Dunes Magic Carpet Tour?

A. Guests of the Dunes Hotel.

Q. Now, prior to December, 1959, did you ever attempt to take the Dunes Magic Carpet Tour?

A. I attempted to fly up to Vegas at one time before.

Q. When was that, if you can recall?

A. The second or third week of January, '59.

Q. Did you attempt to contact, or did you contact someone representing the Dunes Hotel?

A. Yes, I did. [688]

Q. How did you contact them, by what means?

A. By phone.

Q. Whom did you contact?

A. I spoke to Mr. Graham.

(Testimony of Mac Neisen.)

Q. What is his first name, if you know?

A. Chris.

Q. What did you say to Mr. Graham, and what did he say to you in this conversation?

A. Well, I asked him if I could get a flight up to Las Vegas, and he asked me if I was going to stay at the Dunes Hotel.

Q. What did you say?

A. And I said, no, I had previous commitment to the Sarhara.

Q. What did Mr. Graham say to you?

A. He said he was awfully sorry, he couldn't take me up to Las Vegas.

Q. Did he tell you why?

A. Since I was not a guest of his hotel, the Dunes.

Q. How did you get to Las Vegas on that occasion? A. Drove.

Q. Have you ever taken what we call a commercial airline such as Western or United or TWA, or Bonanza, or Pacific Airlines to Las Vegas?

A. No, sir. [689]

* * *

JOAN STEIN

was called as a witness, and, having first been duly sworn, was examined and testified as follows: [691]

Direct Examination

By Mr. Ginsburg:

* * *

(Testimony of Mac Neisen.)

Q. Where are you employed?

A. With the Dunes Hotel.

Q. Where do you perform your services?

A. Beverly Hills office at 204 North Beverly Drive.

Q. What is your position with the Dunes?

A. I am office manager.

Q. Is that of the office you have just described at Beverly Hills? A. Yes, it is.

Q. How long have you been employed by the Dunes Hotel? A. Since March of '59.

Q. What are your duties, Miss Stein, in connection with your employment for the Dunes?

A. I place room reservations with the Dunes Hotel, Magic Carpet Tour reservations for the Dunes Hotel, and secretary to Mr. Lou Friedman.

Q. Can you state for the record approximately what portion of your time you devote to the Dunes Magic Carpet [692] Tour? A. About half.

Q. Now, is there anyone who works under your supervision? A. Yes.

Q. In connection with your duties pertaining to the Dunes Magic Carpet Tour? A. Yes.

Q. Who is that, please?

A. Miss Estelle Crane.

Q. Do you receive and handle inquiries regarding the Dunes Magic Carpet Tour in the office in Beverly Hills? A. Yes, I do.

Q. By what means do you receive these inquiries?

A. By telephone, and people that may walk in.

(Testimony of Joan Stein.)

Q. Can you state for the record what the tours consist of?

A. The tour consists of cocktails en route on our flight going up to Las Vegas, limousine service being furnished for the customer of the Dunes Hotel, guests of the Dunes Hotel to and from the hotel upon their arrival and departure, seeing our main show with a complimentary cocktail, also their baggage is transported directly from the airport to the hotel. Also we have a cocktail at that main show, and our lounge entertainment with a cocktail, buffet dinner, and a bottle of champagne on the return flight, this is all at the Dunes Hotel.

Q. Thank you. What charge is there for the air transportation on the Dunes Magic Carpet Tour?

A. Sunday through Thursday $19.95, Friday, Saturday and holidays $29.95.

Q. These prices you mentioned, what are they for? A. Magic Carpet Evening Tour.

Q. What is the charge for the air transportation on this tour? A. There is no charge.

Q. What is your regular price on the tour—strike that question, please.

Now, do you receive instructions from anyone concerning the Magic Carpet Tour in your functions, in connection with it?

A. Yes, Mr. Lou Friedman.

Q. Can you state to us what Mr. Friedman's instruction to you are?

A. That this free transportation on the Magic

(Testimony of Joan Stein.)

Carpet Tour is available for guests of the Dunes Hotel only.

Q. Have you related these instructions to anyone? A. Yes, I have, Miss Crane.

Q. To whom? A. Miss Crane. [694]

Q. Pardon? A. Miss Crane.

Q. Thank you. Now, with respect to your instructions from Mr. Friedman, has he ever indicated to you why these tours are restricted to guests of the Dunes Hotel?

A. Yes, because we are not in a flight transportation service, and we are not interested in transporting people of other hotels, or wherever they may be staying, just for guests of the Dunes Hotel as a convenience.

Q. Did Mr. Friedman indicate anything to you regarding the profitability of the flights of the Dunes Magic Carpet Tour?

A. We do not work on a, we don't make anything by transporting these people, we work at a loss.

Q. Is that what Mr. Friedman told you?

A. Yes.

Q. Now, have you ever received an inquiry from someone whom you thought might not be a guest of the Dunes Hotel? A. Yes.

Q. Seeking to travel up there on the Dunes Magic Carpet Flight? A. Yes.

Q. When did you last receive an inquiry of this type? [695]

A. The first week of December, '59.

(Testimony of Joan Stein.)

Q. Will you relate what happened on that occasion?

A. Yes. I had a gentleman call me, and he stated that he had a confirmed room reservation at the Dunes Hotel, and was not interested in taking our Magic Carpet Tour, just wanted the flight transportation up and back, and I told him I would be happy to call him back and advise him as to whether or not we could accommodate him.

Q. Did you then contact anyone else?

A. Yes, I contacted Mr. Jack Eisen at the Burbank Airport.

Q. What did you say to Mr. Eisen, and what did he say to you?

A. I related the conversation to him, and he advised me to contact Las Vegas and find out if the room was a confirmed reservation.

Q. If it were, did he make any statement pertaining to this?

A. Yes, he stated that if the room was confirmed that he was to be put on the flight.

Q. Did you contact Las Vegas?

A. Yes, I did.

Q. What did you learn?

A. The room reservation was confirmed for him, and I recall, the gentleman called, we told him we would be happy [696] to accomodate him with the flight transportation up to the hotel.

Q. Do you remember the name of the gentleman? A. No, I don't.

(Testimony of Joan Stein.)

Q. Do you know whether or not he ever took the Dunes Magic Carpet Tour?

A. He didn't take it, he did not take the flight.

Q. Now, prior to this incident in December, have you ever had an inquiry from anyone where you felt that perhaps he might not be a guest of the hotel? A. Yes.

Q. Was that with respect to the Dunes Magic Carpet Tour, the inquiry? A. Yes.

Q. When did this incident take place?

A. This took place November 7th.

Q. Of what year, Miss Stein? A. 1959.

Q. How were you contacted in this instance?

A. By the telephone.

Q. Do you know the name of the person who contacted you? A. Yes, Mr. Buckley.

Q. Did you have a conversation with Mr. Buckley? A. Yes, I did. [697]

Q. Can you relate that conversation stating what he said, and what you said, to the best of your ability?

A. Mr. Buckley called and asked information about our evening tour, Magic Carpet Evening Tour, and after relating this information to him, I asked him how long he planned on staying with us as a guest of the Dunes Hotel, at which time he stated he did not want to stay at the Dunes Hotel, he was just interested in transportation to and from Las Vegas, and he was going to be staying at a motel.

Q. Did he state that to you?

(Testimony of Joan Stein.)

A. Yes, he did.

Q. What did you then say to Mr. Buckley?

A. I informed him that he would have to check with the commercial airline because we were not a transportation service.

Q. Did you say anything further to him?

A. Yes, I did.

Q. What else did you say?

A. This was a lengthy conversation, it was a lengthy conversation, Mr. Buckley said he would like to buy our evening tour package and plan, Magic Carpet Tour, and not make a return flight, and I told him he would still have to contact a commercial airline because I could not possibly sell him an evening tour, if he was not staying at our [698] hotel.

Q. Did you regard Mr. Buckley as a guest of the hotel?

A. No, he had no intention of staying as a guest of the hotel.

Q. Now, how frequently do you receive telephone calls, or inquiries where you have reason to believe, or where there is some indication that the person is not a guest of the Dunes Hotel, or does not intend to be a guest? A. Very few.

Q. Now, does the Dunes Hotel have a Magic Carpet Tour which includes a room at the Dunes Hotel for one or more evenings? A. Yes.

Q. Do you receive inquiries for tours, one or more evenings involved? A. Yes.

(Testimony of Joan Stein.)

Q. Do you have any policy with respect to such tours—strike that question, please.

In connection with such inquiries, do you have a policy as to whether or not a person is qualified to take the tour? A. Yes.

Q. What is that policy, please?

A. Through formal conversation with the individual over the telephone, or if they happen to be in the office, [699] we question them on how long they plan on staying. We advise them what time their return flight will be, and on what date. Only through this form of questioning can we determine whether they want to actually be a guest of the Dunes Hotel, or whether they want to stay elsewhere. Also——

Q. Excuse me.

A. Also, usually a guest of the hotel, or someone that may be calling in to ask about our Magic Carpet Tour has already read our advertisement.

Q. What does your advertisement state?

A. It states the features of the package, and that this is available for guests of the Dunes Hotel.

Q. Now, when the party is going to stay overnight in Las Vegas, is it necessary for him to make any arrangement for the room?

A. Yes, they must place a reservation.

Q. When does the payment, when is the payment made?

A. Payment is made before the departure to Las Vegas.

Q. Is that a requirement? A. Yes, it is.

(Testimony of Joan Stein.)

Q. And, the confirmed reservation is with what hotel? A. The Dunes Hotel.

Q. Is that only the Dunes?

A. Just the Dunes Hotel. [700]

* * *

CHARLES W. MANN

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ginsburg:

* * *

Q. Who is your employer?

A. The Dunes Hotel, Las Vegas, Nevada.

Q. What is the title of your position?

A. Las Vegas flight director and host.

Q. Do you perform your duties in connection with the tour? A. Those are my duties.

Q. What tour is that, sir?

A. Magic Carpet Tour, Dunes Hotel.

Q. How long have you been so employed?

A. The 30th of January, 1959. [707]

Q. Have you been employed continuously since that time? A. Continuously.

Q. Mr. Mann, I want you to state for the record what your duties are.

A. My duties are to meet the Magic Carpet Flight.

Q. Where do you meet it, Mr. Mann?

(Testimony of Charles W. Mann.)

A. At McCarran Airfield, Las Vegas. Board the airplane, disembark our guests from the airplane.

Q. Excuse me just a moment. When the aircraft reaches the ground and touches down on the ground and taxis to the point wherever it does and stops—— A. Yes, sir.

Q. ——what happens precisely at that moment?

A. I board the airplane before anybody gets off. They have instructions from the stewardesses to remain seated until their host Chuck Mann comes aboard the airplane.

Q. Yes.

A. I meet the guests and inform them that the limousine buses are waiting to take them to the Dunes Hotel, that I will get their return confirmations on the limousine and to follow me. I am their host, Chuck Mann.

Q. What do you do at that moment?

A. I thereby disembark from the airplane, go, lead [708] them straight to the limousine buses that are waiting, stand by the door and see that they get on the buses and after that——

Q. Just a moment, Mr. Mann. A. Oh.

Q. Now, how far approximately is the bus, the limousine bus from the aircraft? How long of a walk do the guests have?

A. From the aircraft approximately 100 feet; from the gate that they go out of, approximately 10 feet.

Q. Where is the airport terminal in relation to this?

(Testimony of Charles W. Mann.)

A. I judge approximately four, five hundred feet from the gate.

Q. Do you go through this lobby? A. No.

Q. Do the guests go through it? A. No.

Q. Now, are there occasions when the guests or a guest does not board the bus?

A. Oh, I have had those occasions when overnight guests have reserved a rental car to be picked up at the terminal. They are allowed, I allow them to go up and pick up their car, naturally; but they are not allowed to receive their baggage any place but the Dunes Hotel itself. [709]

Q. Now, will you continue relating.

A. After boarding the bus and reading off the manifest to get their confirmed reservations back, I disembark from the bus and inform the driver to take the guests to the Dunes Hotel. I then pick up the luggage truck and drive the luggage to the hotel.

Q. Do you go in a separate conveyance?

A. I go in a separate conveyance. I take the luggage in.

Q. Now, what is the next step in the procedure?

A. The bus disembarks our guests at the front door of the Dunes Hotel. Most generally the bus and the luggage get there at the same time.

Q. Who is taking the luggage there?

A. The luggage goes right into the hotel.

Q. Who takes the luggage to the hotel?

A. I do.

Q. Where does the bus go from the airport?

(Testimony of Charles W. Mann.)

A. Directly to the Dunes Hotel.

Q. Where else does the bus go?

A. Nowhere else.

Q. Now, what do the guests do when the limousine bus arrives in front of the Dunes Hotel?

A. Our guests disembark from the limousine at the front door and go into the hotel. [710]

Q. What do you do at that time?

A. I am going to the door at the same time they are. I perform the duties of the host of the Magic Carpet Flight, answer various questions, where is the buffet, what time do the shows start and the biggest question is where is the men's and women's room.

Q. Have you ever seen a guest disembark from the bus and go any place other than the hotel?

A. No, sir.

Q. Are your duties at this point concerned with observing and answering inquiries of the guests of the hotel who have gotten off the aircraft?

A. Those are my sole duties.

Q. Now, what disposition is made of the baggage when you take it to the hotel?

A. The baggage is transferred from the baggage truck to the lobby of the Dunes Hotel by the bellman.

Q. Do any of the guests receive their luggage at the entrance of the Dunes Hotel?

A. No, sir. Thye are not allowed to pick it up. It is all brought into the lobby. They have instruc-

(Testimony of Charles W. Mann.)

tions not to give anybody the luggage unless it is lined up in the hotel lobby.

Q. Now, have any guests ever questioned you at the airport on arriving at the airport about their luggage [711] or ever asked for their luggage?

A. I have had guests that have been worried where they pick up their luggage. Evidently they didn't hear it announced on the airplane. I tell them the luggage will be at the hotel on their arrival.

Q. Now, over the past years since you have been employed by the Dunes Hotel, how many of these days have you been on duty and how many of these days have you missed these flights?

A. I have never been late for a flight or missed a flight expect for nine days since January 30, 1959.

* * *

Q. Did someone subsitute for you on those occasions? A. Yes, sir.

Q. Who was that, please?

A. The vice-president of the hotel, Mr. Landy.

Q. Has Mr. Landy ever met any of the flights with you? A. Yes, sir.

Q. Have you advised him as to your procedure to follow? [712]

A. The complete procedure was carried out by Mr. Landy.

Q. As you testified here today, is that correct?

A. Yes, sir.

Q. Now, do you have any rule or regulation

(Testimony of Charles W. Mann.)

about guests carrying on luggage in the passenger compartment of the aircraft? A. Yes.

Q. What is that rule?

A. Nothing over the size of a cosmetic case.

Q. Is that rule observed?

A. It is observed for safety reasons.

Q. Now, Mr. Mann, have you ever had any requests for refunds from guests on the return air transportation from Las Vegas to Los Angeles?

A. Yes, I have.

Q. Do you have a policy in reply to those requests? A. I certainly do.

Q. How have you replied to those requests?

A. I say Mr. or Mrs. so and so, the Magic Carpet Flight is free. So, therefore, there can be no refund.

Q. Have you ever made any refunds under the circumstances?

A. None whatsoever, no, sir.

Q. Now, when do these requests for refunds primarily occur? [713]

A. Primarily in the summer when we have very turbulent flights coming in. The guests don't wish to fly back and would rather take a bus or train.

Q. Have you ever known of any incidents where the guest actually flew up on the Magic Carpet Tour and returned by some other means of transportation?

A. Yes, sir. Not specifically, but there have been cases where they have taken the bus back or a train back because they got sick on the flight up.

(Testimony of Charles W. Mann.)

Q. Do you know of your own knowledge, Mr. Mann? A. Yes, sir.

Q. Now, do you also handle the return Magic Carpet Flight from Las Vegas to Los Angeles and Burbank? A. Yes, sir.

Q. Will you describe the procedure on that, please.

A. Well, our guests are instructed to check in at the flight desk with me for their flight pass a half hour before flight time.

Q. What time do they actually check in? Let's talk about, you have a flight going back early in the morning.

A. Yes, sir. It is scheduled at 3:00 a.m., but there is only one bus, Tanner limousine bus on the graveyard shift, and they are unable to get to the Dunes Hotel until ten minutes after 3:00 at the earliest.

Q. Yes. [714]

A. So, I am checking in the return guests from 2:30 until approximately 3:15, a 45-minute period.

Q. When can the guests pick up their return pass on the aircraft?

A. Half an hour before flight time.

Q. Can they pick it up earlier than that?

A. No, sir.

Q. Where can they pick it up?

A. Only from the flight desk, from myself. I am the only one that operates the flight in Las Vegas.

Q. Continue relating the events surrounding the return flight.

(Testimony of Charles W. Mann.)

A. I pick up their return slip, give them a gate pass and tell them that there will be a flight announcement five minutes before departure, bus departure to load them on the bus.

Q. What happens after that?

A. I give a final announcement, have the operator give an announcement or give a final announcement.

Q. That is the operator there, where?

A. At the Dunes Hotel.

Q. Yes.

A. Over the PA system. I check the bus to see if everybody is aboard the bus that I have checked in on the manifest. [715]

Q. What do you do then?

A. I then inform the limousine driver to proceed to Gate 1, McCarran Field and——

Q. What do you do then?

A. In the meantime I take the luggage truck off with the luggage, outgoing luggage.

Q. Do you meet the limousine bus at the——

A. I meet the limousine bus at McCarran Field and check them through the gate right on the airplane and——

Q. Who do you check through, the guests?

A. The guests. Then I add up the baggage and passenger weight, get my weight and balance from the crew, give them their copies, give the seal up orders and clear right.

Q. What charge is made for the air transportation on the Dunes Magic Tour?

(Testimony of Charles W. Mann.)

A. There is no charge whatsoever, sir.

Q. Have you ever had a request from anybody regarding the using of another person's return pass on the aircraft? A. Yes, I have.

Q. Do you have a policy in reply to such requests? A. Yes, sir, I have.

Q. What is that policy?

A. I tell the person in question that the tour is non-transferrable. [716]

Q. Do you permit them to board the aircraft using somebody else's return pass?

A. Not if I know that it is not their pass.

Q. If I related to you that a Mr. Fuson of Bonanza Airlines purchased a Dunes Magic Flight ticket on Setpember 22nd, 1959, and did not take the return flight and did not use the return pass and gave it to a Mr. Nelson, another employee of Bonanza Airlines who testified, this is Mr. Nelson, that he gave you the return pass for Mr. Fuson and asked to be permitted on the aircraft.

Have I told you about this? A. Yes, sir.

Q. Do you remember this incident specifically?

A. No, sir, I do not.

Q. Have you as a result of our conversation instituted any new policy with respect to using the return pass, the use of the return pass?

A. Yes, sir. If it is not on the confirmed date return, if there is any length between the time of the confirmed return and the time that the guest checked in with me, I ask for identification now.

(Testimony of Charles W. Mann.)

Q. Now, let me ask you this hypothetical question. If you had known that Mr. Nelson was not Mr. Fuson when he handed you this return pass, what would you have done?

A. I would have told him what I tell everybody [717] else, that the package is non-transferable.

Q. Now, Mr. Mann, do you prepare the manifests in Las Vegas for the return Magic Carpet Flight to Los Angeles and Burbank?

A. I do.

Q. Now, do you receive orders and instructions from anyone? A. Major Riddel.

Q. Who is Major Riddel?

A. President of the Dunes Hotel.

Q. Did Mr. Riddel give you any instructions pertaining to the Dunes Magic Carpet Flight and your handling of it? A. Yes, sir.

Q. In Los Vegas?

A. Yes. His instructions were to get people to the Dunes, do everything I can to keep them at the Dunes and make them feel at home, that it costs us a lot of money to fly these guests up here and we didn't want them going any place else. Those were his orders.

Q. Have you done your very best to carry out Mr. Riddel's instructions?

A. I have done my very best, sir.

Q. I am going to show you Respondent's Exhibit 7 in evidence in this proceeding, and I show you Line 11 of [718] that manifest.

(Testimony of Charles W. Mann.)

A. Yes, sir.

Q. Will you please read the entries shown there.

A. Cramer A.

Q. Do you know a person by the name of Cramer A? A. Yes, Miss Cramer.

Q. Did you on the date of this manifest which is January 10, 1960, I believe it is a Sunday, did you see Miss Cramer? A. Yes, I have.

Q. Where did you see her on that occasion?

A. In the Latin Room. I had coffee with her.

Q. What was Miss Cramer doing at that time?

A. She was having a buffet, eating there.

Q. Did you see her in and about the Dunes Hotel on that date?

A. I saw her at that time. That is all I remember seeing her. I distinctly remember seeing her on that date. [719]

* * *

Redirect Examination

By Mr. Ginsburg:

Q. Referring to this no revenue designation in the manifests shown to you by Mr. McCollam.

A. Yes, sir.

Q. Is there any charge imposed by the Dunes Hotel for the air transportation involved where there is a notation no revenue?

A. No charge whatsoever. [727]

Q. Do those people purchase a Dunes Magic Carpet Tour? A. No, sir.

(Testimony of Charles W. Mann.)

Q. Do they purchase any part of a Dunes Magic Carpet Tour? A. No, sir.

Q. Now, in connection with your testimony concerning the off space on TWA. A. Yes, sir.

Q. Did the guests of the Dunes Hotel who were off space on TWA pay the Dunes anything for their transportation from Las Vegas to Los Angeles?

A. None whatsoever.

Q. Now, Mr. Mann, to the best of your knowledge does every person who travels on this flight, the Dunes Magic Carpet Flight, go to the Dunes Hotel and use their facilities?

A. To the best of my knowledge.

Q. Do you know of a single instance where a guest or person who traveled on this Dunes Magic Carpet Flight did not go to the Dunes Hotel and did not partake of its facilities?

A. No, sir. [728]

* * *

JERRY BUCKLEY

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ginsburg:

* * *

Q. Mr. Buckley, did you have occasion recently to call the Dunes Hotel in the Los Angeles area on the telephone? A. Yes, sir.

(Testimony of Jerry Buckley.)

Q. Approximately when did you make that particular call? [729]

A. This was during the month of November.

Q. Do you recall what Dunes office you called?

A. It was the Beverly Hills office.

Q. Did you speak to someone there?

A. Yes, the girl, the receptionist.

Q. Did you make a request of her?

A. Yes, sir, I did.

Q. Will you relate that request as best you can recall?

A. This particular call came on a Thursday. I decided to go to Las Vegas on rather short notice. I called her to find out if there was any possibility of getting on the Dunes Flight.

Q. What did she say?

A. First of all she asked me if I was going up for the all night trip or for the evening, up and return. I advised I was staying over, and she mentioned that there might be some problem in getting me on the flight. As I recall I believe she called me back. Either that or kept me on the phone for a period of time while she did some checking.

Q. Continue relating the conversation.

She at that time verified that she could get me on the flight, and she also had the reservations made for me at the Dunes Hotel. [730]

Q. What did you say, Mr. Buckley?

A. I commented that I was happy to pay the fee for the flight. However, I wasn't certain that I would stay at the Dunes. She commented that that

(Testimony of Jerry Buckley.)

would make it an impossibility for her to sell me the tickets because actually I was staying at the Dunes and it was not the flight that was involved. She would be happy to furnish my transportation, but it was available for the guests of the Dunes.

Q. Were you refused transportation on the Dunes Magic Carpet Tour?

A. On that basis, yes.

Q. Did you go to Las Vegas by some other means? A. Yes, sir, I did.

Q. Did you go by some other means?

A. Yes.

Q. How did you go there?

A. I took the Union Pacific, City of Las Vegas or the special train that they have to go to Las Vegas.

Q. Now, Mr. Buckley, do you know who can travel on the Dunes Magic Carpet Flight?

A. My understanding is it is the guests of the Dunes.

Q. Did you know whether or not there is any charge for the Dunes flight?

A. No, I understand the Dunes flight is of [731] no obligation.

Q. No charge, is that correct? A. Right.

Q. Have you ever seen the Dunes ad in the Los Angeles newspapers?

A. Yes, sir. That is I believe where I first came in contact with the flight.

Q. Do you know, do you recall whether there

(Testimony of Jerry Buckley.)

was any limitation on who could take the flight in that ad?

A. To the best of my knowledge, as I recall, it says the guests of the Dunes Hotel.

Q. Now, have you ever taken the Dunes Magic Carpet Tour on any other occasion?

A. Yes, sir.

Q. To the best of your knowledge when did you take the Dunes Magic Carpet Tour?

A. This was in the area of May.

Q. You are not certain?

A. The summer months. I am not certain of the date.

Q. Did you stay overnight in Las Vegas on that occasion?

A. On that occasion, no. We came back, left Las Vegas at approximately 4:00 o'clock in the morning.

Q. Were you traveling with someone else? [732]

A. Yes, sir.

Q. Who were you traveling with?

A. Mr. Martinez.

Q. Is he associated with you in your business?

A. Yes, sir, he is.

Q. Now, when you arrived in Las Vegas, would you state what happened when the aircraft landed at the airport?

A. Certainly. We landed at the airport in Las Vegas. There was a Tanner limousine bus waiting to pick us up after we got off, and we got directly

(Testimony of Jerry Buckley.)

onto the transportation provided by the Dunes and went to the Dunes Hotel.

Q. Where else did the bus go?

A. Nowhere that I can recall.

Q. Did all the guests who were on the bus get off at the Dunes Hotel?

A. Yes. I am quite certain of this. I was in the back.

Q. Where did you spend the evning, where did you and Mr. Martinez spend the evening that you were in Las Vegas on that occasion?

A. I would say 95 per cent of the time we spent at the Dunes.

Q. Did you partake of the buffet dinner that is made available or purchased as part of the Dunes Magic [733] Carpet Tour?

A. Yes, sir, I did or we did, I should say.

Q. Yes. Did you attend the show in the Arabian Room which is made available or which is a part of the Dunes Magic Carpet Tour? A. Yes.

Q. Did you also obtain a cocktail, a free cocktail or a cocktail in connection with that show which is part of that tour?

A. Yes. I believe I took advantage of all of the opportunities made available.

Q. Did you return on the Dunes Magic Carpet Tour that same evening? A. Yes. [734]

* * *

HERBERT HYMAN

was called as a witness by and on behalf of the Respondents and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ginsburg:

Q. And do you reside in the Los Angeles area, Mr. Hyman? A. Yes.

Q. Mr. Hyman, did you ever travel to Las Vegas on the Dunes Magic Carpet Tour?

A. Yes, I have.

Q. And referring to the year 1959, how many times have you taken the Dunes Magic Carpet Tour?

A. I would say approximately three times.

Q. When did you last take the Dunes Magic Carpet [742] Tour?

A. Oh, it was this past Tuesday a week.

Q. Would that be the 12th of January of this year? A. I would assume so.

Q. And prior to that when did you take the Dunes Magic Carpet Tour, if you can recall?

A. Around the summertime.

Q. Of this—of 1959? A. Of 1959.

Q. And prior to that did you take it this year?

A. Yes, several times, the early part of the year. The latter part I didn't get a chance to get up there as much as I tried but——

Q. Mr. Hyman, have you stayed overnight in Las Vegas on each of these occasions?

A. One time I didn't, no.

(Testimony of Herbert Hyman.)

Q. And do you recall when that occasion was?

A. When I took my brother-in-law, he is from New York, and I took him as a guest for the evening at the Dunes.

Q. And where did you leave from on that occasion? A. From Burbank.

Q. And where did you leave from on the other occasions you have testified about?

A. Burbank. [743]

Q. On the occasion when you went with your brother-in-law when did you return from Las Vegas?

A. We came back on the early morning flight, that was I believe 4:00 o'clock in the morning.

Q. Would that be the following morning?

A. Yes.

Q. And where did you spend your time in Las Vegas on that occasion? A. At the Dunes.

Q. Now, on the other occasions in 1960 when you took the Dunes Magic Carpet Tour you stayed overnight, is that correct? A. Yes.

Q. In Las Vegas? A. Yes.

Q. And where did you stay on each of those occasions? A. At the Dunes.

Q. Now, Mr. Hyman, do you know what the charge is for the air transportation on the Dunes Magic Carpet Tour?

A. I don't—my understanding is there are not charges as far as the flight is concerned.

Q. And do you know to whom the Magic Carpet Flight is available, what group of people?

(Testimony of Herbert Hyman.)

A. Well, according to my understanding it is available to the guests of the hotel. [744]

Q. Now, on each of the occasions in 1959 when you traveled on the Dunes Magic Carpet Tour, did you sign a document, a paper at the desk or the check-in counter at the Burbank Airport?

A. To my recollection I have, yes.

Q. Mr. Hyman, I show you what has been marked for identification as Respondent's Exhibit 6-C for identification and I ask you if you have ever seen a book similar to this? A. Yes.

Q. And where did you see it, sir?

A. At the reservation desk at the airport, Burbank Airport.

Q. What do you understand this book to be?

A. It is a guest register for the hotel.

Q. And what hotel is that, sir?

A. That's the Dunes, that's where I go.

Q. And I show you, Mr. Hyman, a page with the date 1-12-60, it would be the second line, and I show you a signature there and I ask you if you can identify it. A. That's my signature.

Q. And this is your address shown here, 12728 Bessemer Street, North Hollywood? A. Yes.

Q. Now, on the occasion when you went to Las Vegas on the Dunes Magic Carpet Tour in January of this year [745] did you purchase the Dunes Magic Carpet Tour, purchase anything?

A. I don't understand you.

Q. Now, on the occasions prior to January 12th when you went to Las Vegas on the Dunes Magic

(Testimony of Herbert Hyman.)

Carpet Tour, Dunes Magic Carpet Flight, excuse me, did you acquire a document similar to this which has been marked as R-5 for identification?

A. Yes.

Q. And did you pay some sum for that?

A. Yes.

Q. Now, on the occasion of the January 12th flight did you purchase one of these tours?

A. Yes, we got tickets like this, too.

Q. Did you pay any sum of money at all for the benefits outlined in this booklet which is identified as R-5 on the occasion of the January 12th flight?

A. Did I pay any sum for these tickets?

Q. Yes. A. Yes, yes.

Q. Now, Mr. Hyman, are you familiar with the procedure, do you recall the procedure that's followed when the Dunes Magic Carpet Flight arrives in Las Vegas? A. Yes.

Q. Does someone board the aircraft when it arrives [746] in Las Vegas?

A. Well, they have a fellow who meets the plane and boards the plane before anybody, any of the guests of the plane get out.

Q. Yes.

A. He greets everybody and welcomes them in the name of the Dunes Hotel.

Q. And does that person take the guests anywhere?

A. Yes. He directs them from the plane and helps them get aboard the bus which is usually

(Testimony of Herbert Hyman.)

parked right outside the gate, and we get—you get on the bus and he then reads off all the names and then we go to the hotel.

Q. Going back just a moment, do you pass through the passenger terminal at the airport to get to the bus? A. No.

Q. Have you ever observed on any of your trips to Las Vegas any of the other guests of the Dunes Hotel get out of the aircraft and not board the bus?

A. Not to my knowledge, no.

Q. Now you stated the bus goes to the Dunes Hotel. Does the bus go any other place, do you know? A. No.

Q. When you arrive at the Dunes Hotel on the bus, where do you go from there?

A. The bus doesn't go anywhere. My understanding is [747] that's it.

Q. Where do you go from there, is my question?

A. I go in the lobby to register.

Q. Where do you receive your baggage?

A. In the lobby.

Q. Have you ever observed the Dunes advertisements in the Los Angeles newspapers?

A. Yes.

Q. And have you observed in that advertisement that there is any limitation on who can travel on the Dunes Magic Carpet Flight or take the Dunes Magic Carpet Tour?

A. Well, no limitation except it just says "Limited to the guests of the hotel," I mean. Of course, there's never been any problem with me

(Testimony of Herbert Hyman.)

because I have always been a guest there. That's the only place I go actually.

Q. Have you ever taken a commercial airline such as Pacific or United or TWA or Western Airlines to Las Vegas? A. No, never.

Q. And do you partake of the benefits which you purchase on the Dunes Magic Carpet Tour such as the buffet dinner? A. Yes, yes, I have.

Q. And the cocktail in the Sinbad Lounge?

A. Yes. [748]

Q. And the cocktail in the Arabian Room?

A. Yes.

Q. And do you also acquire the bottle of the Dunes special champagne?

A. Four or five of those.

Q. Have you always been well treated at the Dunes Hotel?

A. Well, I wouldn't go anywhere else in Las Vegas.

Q. And do you enjoy the tour that is available to you? A. Very much so. [749]

* * *

Mr. Ginsburg: Mr. Examiner, at this time [763] I would like to have Exhibit R-8 identified.

Examiner Walsh: Very well.

Mr. Ginsburg: It purports to be the hotel register of the Dunes Hotel, a sample of certain representative days showing the entries in the hotel register made at the Los Angeles Air Terminal and Los Angeles International Airport at Burbank. We

also have the cover page of the second book of the Los Angeles International Airport, that is the guest register that is maintained there. I will state for the record just precisely what is contained. There is the cover page from the second book of the hotel guest register maintained at the Los Angeles International Airport, the Catalina counter. There are the actual pages from the guest registers showing entries on July 17, 1959, September 22nd, 1959, November 7, 1959, and January 10, 1960. Now, with respect to these documents the Compliance Attorney and I are stipulating that these are typical entries for typical days in the hotel guest registers maintained at the two places, Los Angeles International Airport and Lockheed Air Terminal in Burbank. They are typical only for the period with respect to the Burbank book or books after April 1, 1959, and for the Los Angeles International Airport hotel guest registers for the period commencing July 8th, 1959. Is that stipulation agreeable?

Mr. McCollam: Yes. [764]

Examiner Walsh: Very well. The record will so show.

Mr. Ginsburg: At this time I would like to offer in evidence Respondent's Exhibit R-8.

Examiner Walsh: Very well. It is received.

(Respondent's Exhibit No. R-8 was marked for identification and received in evidence.)

Mr. Ginsburg: Mr. Examiner, at this time in view of the stipulation with the Compliance Attorney I would like to withdraw the exhibits pre-

viously identified as R-2, R-4 A and B and R-6 A, B and C, which are the originals of the hotel guest books, guest register books.

Examiner Walsh: That may be done.

Mr. Ginsburg: They will be available here at the hearing if anybody needs them.

(Exhibits R-2, R-4 A and B and R-6 A, B and C were withdrawn.)

Mr. Ginsburg: I will call Mr. Harry Lloyd.

HARRY LLOYD

resumed the witness stand, and having been previously sworn, [765] testified further as [766] follows:

* * *

[Title of Board and Cause.]

MOTION TO DISMISS

Catalina Air Transport, by its attorneys, respectfully requests the Board to dismiss the complaint in this proceeding as to Catalina Air Transport. At the present time, Catalina has not conducted operations for more than a year and does not have any personnel in its employ. It is therefore clear that the issuance of a Cease and Desist Order by the Board against Catalina would not serve the public interest in any manner. Such an order would only injure the reputation of its past officers and execu-

tives such as Mr. Donald C. McBain who resigned his position as president on July 31, 1959.

Wherefore, it is respectfully requested that the Board dismiss the complaint against Catalina Air Transport in this proceeding and for such other and further relief as the Board may deem reasonable and proper.

Respectfully submitted,

CATALINA AIR TRANSPORT.

By HALEY, WOLLENBERG & BADER,

/s/ ANDREW G. HALEY,

/s/ DONALD L. RUSHFORD.

Affidavit of service by mail attached.

Received: November 1, 1960.

United States of America Civil Aeronautics Board, Washington, D. C.

Docket No. 10606

In the Matter of:

M & R INVESTMENT COMPANY, INC., d/b/a DUNES HOTEL AND CASINO, et al.

EXECUTIVE SESSION

Los Angeles, California, Friday, January 15, 1960.

* * *

HARRY R. LLOYD

was recalled as a witness on behalf of the Office of Compliance and, having been first duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. McCollam: [1341]

* * *

(Respondents' Exhibit No. 3 was marked for identification.) [1358]

* * *

Q. To your knowledge, how long has this same wine list been in effect and available at the Dunes Hotel? A. Since September of '58.

* * *

Q. And what price is shown?

A. $17.50 per bottle.

Q. Do you know what price this champagne is available for to purchase at the Dunes Hotel?

A. Yes, sir.

Q. What price is that? [1359] A. $17.50.

Q. Now, I will ask you if you know, if you will examine this wine list, if you will state whether each of the items on this wine list is offered for sale with the expectation or hope of making a profit on it? A. Yes, sir. [1360]

* * *

(Testimony of Harry R. Lloyd.)

Further Recross-Examination

By Mr. Ginsburg: [1373]

* * *

Q. In connection with guests who have reservations, room reservations to the Dunes Hotel, do you know when they pay those—let's assume someone who is taking the Magic Carpet; when they pay for those rooms, in relation to whether it is before or after they take the flight from Los Angeles to Las Vegas?

A. They pay for those rooms before they board the aircraft for the flight. [1374]

* * *

Q. This guest registration book has been marked for identification as R-2, Respondents' No. 2 for identification, and it was identified by someone—I forget whom—as the registration book at the Lockheed Air Terminal in Burbank. A. Yes, sir.

Q. Have you ever seen one of these books before?

A. Yes, sir.

Q. Do you know when the Magic Carpet Tour guests sign that book in relation to the time of the flight? A. Before they board the aircraft.

Q. I will ask you if the Dunes regards this guest registration book as an official part of the Dunes records? A. Yes, they do.

Q. And how is it regarded, if you know?

(Testimony of Harry R. Lloyd.)

A. How do you mean? It is regarded as an official record of registration of guests of the Dunes Hotel. [1375]

* * *

A. It will show the champagne and the buffet——

Mr. Ginsburg: I object, not the best evidence.

Mr. McCollam: Try to find out what the evidence is.

Mr. Ginsburg: I emphasize in this proceeding that this isn't just an exploratory conversation. This is an enforcement case. How can I make it plainer? This man keeps saying that he wants the record to show, and all this sort of thing. There are issues in this proceeding. [1378]

* * *

January 22, 1960

(Mr. Harry Lloyd, on the stand at the time the hearing went into Executive Session, resumed his testimony as follows:)

Q. (By Mr. Ginsburg): Mr. Lloyd, will you state your position at the Dunes Hotel?

A. I am comptroller and assistant to the president.

Q. Do you have executive functions in addition to your accounting and auditing? A. Yes, sir.

Q. That's in your capacity as the assistant to the president of the Dunes? A. Yes, sir. [1384]

(Testimony of Harry R. Lloyd.)

* * *

Q. Now, Mr. Lloyd, are you familiar with the price of the Dunes Magic Carpet tour, the charge to the guests of the Dunes? A. Yes, I am, sir.

Q. Will you state for the record what the charges for the Dunes Magic Carpet tour is?

A. $29.95 [1385]

Q. Now, is that price charged all the times?

A. No, sir. During the week it is reduced to $19.95.

Q. Will you state the reason for that, Mr. Lloyd?

A. We do that as an added inducement to have our guests come in the middle of the week when the facilities are not quite so crowded and more room is available.

Q. Mr. Lloyd, I am going to ask you about each of the items in the Dunes Magic Carpet tour package. Are you familiar with the items in that package tour? A. Yes, sir.

Q. And in connection with some of these items I am going to ask you the basis for the charge to the Dunes guests. Now, first of all, what is the charge for the air transportation?

A. The charge on the package is $1.00 from McCarran Air Field to the Dunes Hotel.

Q. Were you referring to the limousine service?

A. The limousine service.

Q. I am talking about the air transportation.

A. Oh, I am sorry.

Q. What is the charge?

(Testimony of Harry R. Lloyd.)

A. There is no charge for the air transportation.

Q. What is the charge to the guests for the limousine service from the Las Vegas Airport to the hotel, the Dunes Hotel? [1386] A. $1.00.

Q. And will you state what the basis for that charge is, Mr. Lloyd?

A. That is the rate charged by Tanner Motor Tours to any person arriving at the Las Vegas Airport who wishes to go to a hotel on the Strip.

Q. Will you state for the record how you know that that's the charge?

A. There is a sign at McCarran Airport where the limousine parks.

Q. And what does that sign say?

A. It says "One Dollar per Person to Any Hotel on the Strip," and "One Dollar and a Quarter to any Downtown Area."

Q. Now is the Dunes Hotel on the so-called Strip in Las Vegas? A. Yes, sir, it is.

Q. Now what is the charge to the Dunes Hotel guests for the buffet dinner? A. $2.00.

Q. And what is the basis for that charge?

A. That is our regular retail price to any person who comes into the hotel.

Q. And purchases that buffet dinner?

A. And purchases the dinner.

Q. Now what is the charge to the Dunes guests for the [1387] cocktail in the Sinbad Lounge?

A. Eighty-five cents.

Q. And will you state for the record what the basis is for that charge?

(Testimony of Harry R. Lloyd.)

A. That is the normal average bar price in the Sinbad Lounge.

Q. Well, what is the range of bar prices in the Sinbad Lounge?

A. They will range from 75 cents to $1.25.

Q. Now as a holder of the Dunes Magic Carpet tour they are entitled to the $1.25 drink?

A. Yes, sir.

Q. What is that drink, for the record?

A. Champagne cocktail.

Q. Now what is the charge to the guest for the show reservation and one drink? A. $3.00.

Q. What is the basis for that charge?

A. That is the rate charged to any guest of the hotel who wishes to attend that show.

Q. Whether or not he is a holder of the Dunes Magic Carpet tour?

A. Thats right, sir, any person who wishes to go.

Q. What is the charge for the bottle of the Dunes champagne? [1388] A. $17.50.

Q. What is the basis for that charge, please?

A. That is our retail selling price for champagne.

Q. What is the charge for the limousine from the hotel to the airport, Dunes Hotel to the airport?

A. $1.00.

Q. What is the basis for that?

A. That is the standard charge made by Tanner.

Q. To a member of the public?

A. For any person.

Q. Is that right?

A. Yes, to the general public.

(Testimony of Harry R. Lloyd.)

Q. Now, do you also have a charge for the champagne in flight? A. Yes, sir.

Q. And what is that, please?

A. It runs from $5.00, $5.51.

Mr. Ginsburg: Mr. Examiner, at this time I would like to have marked as Respondents' Exhibit No. 9 for identification what purports to be a statement of champagne issued the guests in flight on the Dunes Magic Carpet tour for the Dunes flight package?

Examiner Walsh: It will be so marked.

(Respondents' Exhibit No. 9 was marked for identification.) [1389]

Q. (By Mr. Ginsburg): Mr. Lloyd, I show you Respondents' Exhibit 9 for identification and ask you to examine it. A. Yes, sir.

Q. By whom was this exhibit prepared, Mr. Lloyd? A. By me, sir.

Q. Is it true and correct to the best of your knowledge and belief? A. Yes, sir.

Q. And what was the source of your information for the figures that appear on this document?

A. The champagne requisitioned from our main storeroom in the Dunes Hotel, and the number of Magic Carpet tours from the manifests.

Q. Will you state for the record why the particular months of March, June and October and December were selected by you?

A. Well, the resort business is based on the season of the year actually, and I took what I

(Testimony of Harry R. Lloyd.)

considered to be representative months out of the four seasons of the year.

Q. Will you state for the record how you computed the cost of the champagne in flight for each individual guest on the Dunes Magic Carpet tour?

A. I took the number of bottles issued, say for the month of March, multiplied that by our retail selling price, [1390] divided that figure by the total number of Magic Carpet tours for that month, and arrived at an average cost per guest.

Q. Now is the Dunes Hotel a resort type of hotel? A. Yes, sir.

Q. I will ask you what these bottles of champagne which you took from the requisition list—is that right——

A. They are issued on requisition.

Q. ——what are they used for?

A. They are used for the champagne and issued to the guests in flight on the Magic Carpet tour.

Q. Are they used for any other purpose?

A. No, sir.

Q. Now will you state for the record what the total cost of the tour package is as it appears from this exhibit? A. $30.96.

Q. But in actuality you sell it for what price?

A. $29.95.

* * *

Q. Now, Mr. Lloyd, will you state for the record what the facilities—Strike that, please. What is the primary [1391] business of the Dunes Hotel?

A. The resort hotel business, and Casino.

(Testimony of Harry R. Lloyd.)

Q. Will you state for the record, just describe the facilities of the Dunes Hotel, what it consists of?

A. Those of a normal resort hotel; we have 200 rooms, swimming pool, lawns, flowers, a coffee shop, a theater-restaurant, a cocktail lounge and a large Casino.

Q. Do you have any shops also in your hotel?

A. Yes, sir; a gift shop and cigar stand, flower shop, a barber shop, and a beauty salon.

Q. Now, does the Dunes own any facilities in connection with the—Does the Dunes own any aircraft? A. No, sir.

Q. Does it own any aviation equipment to your knowledge that is used in the Magic Carpet tour, Magic Carpet flight I should say?

A. Not aviation equipment as such; office equipment, a truck that is used to transport baggage, and that sort of thing.

Q. That is used in what city?

A. Las Vegas.

Q. Now, Mr. Lloyd, does the Dunes Magic Carpet tour operate on a profit basis? A. No, sir.

Q. Do you have an estimate of the profit or loss for [1392] the year 1959?

A. Yes, sir, I made such a study.

Q. And what is the result of your study?

A. It was in excess of $100,000.00.

Q. What was that, profit or loss? A. Loss.

Q. Thank you. I will ask you if the Dunes has ever had a profitable month during the year 1959 on the Magic Carpet tour? A. No, sir.

Q. Mr. Lloyd, we had better go through the

(Testimony of Harry R. Lloyd.)

individual items on the Dunes Magic Carpet tour to determine how you attributed expenses to the tour.

First of all, how many employees are there at the Dunes who work on the Dunes Magic Carpet tour?

A. There are four full-time employees and four part-time.

Q. And did you consider the salaries of these people in setting this up, in determining the profitability or loss of the Magic Carpet tour?

A. Yes, sir.

Q. Will you state for the record how you determined the profitability or the loss that occurred on the Magic Carpet tour?

A. Well, I prepared a more or less profit or loss [1393] statement on the various items that comprised the tour. However, in computing this loss I did not use the retail price of the various items there. I used our actual wholesale cost.

Q. All right. I will ask you some specific questions, Mr. Lloyd. What do you include as the cost of the limousine service in this computation?

A. I used 50 cents per guest each way.

Q. What amount do you actually pay to Tanner for this? A. Fifty cents.

Q. What charge did you include for the buffet dinner?

A. $2.00. That is our actual cost on that buffet.

Q. In other words, the buffet is not a profit-making operation?

(Testimony of Harry R. Lloyd.)

A. No, sir, it is there to—as an attraction of the inn—I mean of the Dunes Hotel.

Q. And what charge did you make for the Sinbad Lounge cocktail?

A. I used the—over-all bar cost plus the over-all percentage cost of payroll to arrive at that.

Q. Did you take the retail price of the drink into consideration? A. Yes, sir.

Q. Did you use the retail price of the drink as the cost? [1394]

A. No, sir. I used our actual bar cost on that.

Q. And did it include any portion or the salaries of the people who make the drink, bartenders and so forth? A. Yes, sir.

Q. What cost did you include for the show reservation and cocktail?

A. Just the actual cost of the beverages consumed.

Q. And again you are not referring to the retail price? A. No, our wholesale cost.

Q. And did you include any amount of salaries or wages paid to anyone?

A. Not on that particular item. I computed that only in the Sinbad Lounge cocktail because we feel that it picks up the waiters and the waitresses and cooks and bakers and everyone else who are indirectly concerned with those guests.

Q. What charge did you include for the Dunes special Gold Label Champagne, the bottle of champagne that is given to the guests?

(Testimony of Harry R. Lloyd.)

A. I used our wholesale cost which is 1.5075, something like that.

Q. Something slightly more than $1.50?

A. That's right, sir.

Q. And for the limousine service from the Dunes Hotel to the airport? A. Fifty cents. [1395]

Q. Who can take the Dunes Magic Carpet flight?

A. Only guests of the Dunes Hotel.

Q. And why is that limitation imposed?

A. Well, primarily because we are not interested in just bringing people to Las Vegas to go to the Riviera, the Desert Inn, or any other hotel on the Strip. We want them in the Dunes Hotel.

Q. And you are willing to fly them?

A. Free of charge to get them there.

Q. Will you state how the Dunes management regards the Magic Carpet tour and in what light it regards it?

A. They regard it as a convenience to our guests, just the same as they consider our telephone department a convenience to the guests.

Q. Let me ask you this: Does the telephone department of your hotel operate at a profit or at a loss?

A. It has never made a nickel since the day it started.

Q. Does it operate at a loss?

A. Definitely, sir.

Q. How does that compare with the experience you have had with other hotels?

(Testimony of Harry R. Lloyd.)

A. It is the same in any hotel that you go into. Their telephone department is a loss.

Q. Has that been your experience in your 25 years in this business? [1396] A. Yes, sir.

Mr. Ginsburg: Now I would like to have marked as Respondents' Exhibit for identification a statement of various items entitled "M & R Investment Company Magic Carpet Tour, Calendar Year 1959," as Respondents' Exhibit No. 10.

Examiner Walsh: It will be marked for identification.

(Respondents' Exhibit No. 10 was marked for identification.)

Q. (By Mr. Ginsburg): I show you Respondents' Exhibit No. 10 for identification, Mr. Lloyd, and ask you to examine it. A. Yes, sir.

Q. Who was this exhibit prepared by?

A. Myself.

Q. Is it true and correct to the best of your knowledge and belief? A. Yes, sir.

Q. Will you state for the record what this exhibit contains, please?

A. It contains the—by months in the calendar year 1959 the total number of Magic Carpet tours we had, the bottles of champagne that were picked up by our guests, the buffet dinners that were used by our guests, also a month-by-month recapitulation of our gross revenues, both the hotel and those derived from the sales, the Magic Carpet tour coupons. [1397]

(Testimony of Harry R. Lloyd.)

Q. Is there another column?

A. Yes, totalling those two revenues.

Q. And with respect to those monthly and annual revenues that you have just referred to, are those expressed in dollars? A. Yes, sir.

Q. I will ask the witness to add a dollar sign to the exhibit so it will be clearly indicated.

A. (Witness did as directed.)

Q. What is the source of the figures appearing under the total number of Magic Carpet tours? Where did you obtain the information that you included there? A. From the daily manifests.

Q. And the number of bottles of champagne that were picked up by the Dunes Magic Carpet tour guests, where did you obtain that information?

A. By the number of coupons turned in by the bartender who presented these bottles to the guests. [1398]

* * *

Q. Now, what was the source of the information for the number of buffet dinners as indicated in this exhibit?

A. The number of coupons turned in by the food checkers.

* * *

Q. What is the source of the figures appearing under "Hotel Revenues"? Where do you get those from?

A. The original books and records of M & R investment [1399] Company.

(Testimony of Harry R. Lloyd.)

Q. And just for the record, the Dunes Hotel is a fictitious name for M & R Investment Company?

A. That's right, sir.

Q. And is the same true of the source of the revenues for the Magic Carpet tour? Where do you obtain those from?

A. From our books and records.

Q. And have you also made the percentage computations appearing on the bottom line of the exhibit? A. Yes, sir.

Q. Now, Mr. Lloyd, you have testified how many employees of the Dunes are employed in connection with the Dunes Magic Carpet tour. Can you tell us how many employees the Dunes has, the Dunes Hotel has all told?

A. It will average out at 500. It varies according to the time of the year, but not too much.

Q. Mr. Lloyd, can you state for the record—Do you know what the investment of the Dunes Hotel is and its facilities? A. Yes, sir.

Q. And what is that?

A. Well, the M & R Investment Company is actually a leasehold and our interest there is $1,300,000.00.

Q. What is the amount of the investment of the M & R Investment Company, Inc., in the facilities involved in the [1400] Magic Carpet tour?

A. I couldn't state definitely, but it would be under $10,000.00 in trucks, office equipment and that sort of thing.

Mr. Ginsburg: Mr. Examiner, I would like to

(Testimony of Harry R. Lloyd.)

have marked as Respondents' Exhibit No. 11 for identification what purports to be a tabulation of the M & R Investment Company, Inc., tour coupons usage January 10, 1959.

The Witness: That should be '60.

Mr. Ginsburg: '60, I beg your pardon.

Examiner Walsh: That is marked for identification as Respondents' Exhibit 11.

(Respondents' Exhibit No. 11 was marked for identification.) [1401]

* * *

Q. Will you state what the exhibit contains?

A. It contains all the coupons used on January 10th, 1960.

Q. What coupons are they?

A. Of the Magic Carpet tour.

Q. Now does this exhibit purport to be an analysis of the use of these coupons for that flight?

A. Yes, it does, sir.

* * *

Q. I show you Respondents' Exhibit No. 7 in evidence which is a passenger manifest dated January 10, 1959, which has been corrected to be January 10, 1960, and ask you if these are the same persons whose coupons appear in Exhibit No. 11 for identification? [1402] A. Yes, sir.

* * *

(Testimony of Harry R. Lloyd.)

Mr. Ginsburg: Now, Mr. Examiner, I would like to state for the record that I have certain documents which I do not want to burden the record with, but which I made available to the Compliance Attorney for examination, and they consist of the following: audit copy of the Dunes Hotel Magic Carpet tour for each of the guests who were on this flight. This is similar to one of the pages of Respondents' Exhibit No. 5 for identification. It would be the first copy of the top coupon, the one that's written on. In addition we have for each of the passengers and guests of the Dunes Hotel a signed—this would be for 56 of the 57—a signed Dunes Hotel register card. [1403]

* * *

These folios and audit copies of the tour booklet, the Magic Carpet tour booklet and the signature cards for 56 of the 57 tour guests would be available during the remainder of the session of the hearing for examination by Compliance Attorney. I will turn them over to the Compliance Attorney now and would have the record reflect that, Mr. Examiner.

Examiner Walsh: Yes. [1406]

* * *

Q. Now will you state again what you regard as the primary business of the Dunes Hotel?

Mr. McCollam: I object to that. That's been

(Testimony of Harry R. Lloyd.)

asked and answered, and I didn't question him about that at all.

Mr. Ginsburg: You were going into the Casino, as to the extent of the operation of the Casino.

Examiner Walsh: Very well, I will overrule it.

Mr. Ginsburg: Could I have it read back?

Examiner Walsh: Read the question, Miss Reporter.

(Pending question read.)

The Witness: Resort hotel and casino. [1422]

* * *

Mr. Ginsburg: Mr. Examiner, at this time I would like to offer in evidence Respondents' Exhibits 9, 10 and 11 for identification.

* * *

(Respondents' Exhibits Nos. 9, 10 and 11 were received in evidence.)

* * *

In the United States Court of Appeals
for the Ninth Circuit

No. 17314

M & R INVESTMENT COMPANY, INC., d/b/a DUNES HOTEL AND CASINO, et al.,

Petitioners,

vs.

CIVIL AERONAUTICS BOARD OF THE UNITED STATES OF AMERICA,

Respondent.

CERTIFICATION OF TRANSCRIPT OF RECORD

It Is Hereby Certified that the annexed materials numbered from page 1 to page 1337, inclusive, together with the materials listed in the attached separate index, constitute a true copy of the transcript of record upon which was entered Civil Aeronautics Board Order E-16331.

The annexed materials comprise the public portions of the transcript of record relating to said Order E-16331. The materials listed in the separate index were, on petitioners' motion, withheld from public disclosure pursuant to Rule 39 of the Board's Rules of Practice and Section 1104 of the Federal Aviation Act of 1958. Such confidential materials are being held by the Board for and on behalf of

the Clerk and subject to his orders as provided in Rule 34 of the Rules of Court.

Dated: May 1, 1961.

[Seal] /s/ JAMES L. DEEGAN,
Acting Secretary.

[Endorsed]: No. 17314. United States Court of Appeals for the Ninth Circuit. M & R Investment Company, Inc., D/B/A The Dunes Hotel and Casino, Petitioner, vs. Civil Aeronautics Board, Respondent. Transcript of Record. Petition to Review an Order of the Civil Aeronautics Board.

Filed: May 11, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit

No. 17314

M & R INVESTMENT COMPANY, INC., d/b/a DUNES HOTEL AND CASINO, et al.,

Petitioners,

vs.

CIVIL AERONAUTICS BOARD OF THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REVIEW OF ORDER OF THE CIVIL AERONAUTICS BOARD OF THE UNITED STATES OF AMERICA

To the Judges of the United States Court of Appeals for the Ninth Circuit:

The petition of M & R Investment Company, Inc., d/b/a Dunes Hotel, Trans-Global Airlines, Inc., Catalina Air Transport, d/b/a Catalina Airlines, Don Rich and Fred Miller, respectfully shows to the court as follows:

Nature of the Proceedings

The petitioners seek judicial review of an order[1] of the Civil Aeronautics Board issued at the con-

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[1]Opinion and Order E-16331, decided February 1, 1961. The Board, by Order E-16541, dated March 22, 1961, denied Petitioners Petition for Rehearing, Reargument and Reconsideration, and partially granted Petitioners' Motion for Stay of Board Order E-16331 until 30 days after this Court enters its opinion in Las Vegas Hacienda Inc. v. Civil

clusion of an administrative proceeding, entitled "In the Matter of M & R Investment Company, Inc., d/b/a Dunes Hotel Enforcement Proceeding, Docket No. 10606."

The petitioners are M & R Investment Company, Inc., d/b/a Dunes Hotel, which engages in the resort hotel business in Las Vegas, Nevada; Trans-Global Airlines, Inc., and Catalina Air Transport, commercial operators of aircraft, holding operating authority pursuant to Part 45 of the Civil Air Regulations,[2] Don Rich and Fred Miller, officials of Trans-Global Airlines.

This proceeding was instituted when the Board of Enforcement filed a complaint with the Board, asserting that petitioners were violating the Federal Aviation Act [49 U.S.C., Section 1301 et seq.]. Specific violations found by the Board in the administrative proceeding were:

1. The Dunes Hotel was engaging in air transportation as an indirect air carrier by holding out and selling Dunes Tours to the general public, and providing air transportation to patrons of the Dunes Tours, without the requisite authority from the Board, in violation of 49 U.S.C., Section 1371(a).

2. Trans-Global and Catalina are, or were, engaging directly in interstate air transportation as

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Aeronautics Board, No. 17081. Petitioners will file copies of Board Order E-16541 upon receipt of copies of said order. Board Order and Opinion No. E-16331 is attached hereto as Exhibit "A."

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[2] 14 C.F.R. 45.

common carriers, for compensation or hire, without appropriate authority from the Board, in violation of 49 U.S.C., Section 1371(a). These petitioners had operated aircraft used for the transportation of patrons of the Dunes Tours.

3. Petitioners, Rich and Miller, as the "principals" of Trans-Global Airlines, Inc., and as partners in the C-46 Company,[3] which leased aircraft which were used in the operation of the Dunes Tours, were also enjoined from "engaging in air transportation," in violation of 49 U.S.C., Section 1371(a).

Jurisdiction and Venue

The Court is given jurisdiction to review the order in question by 49 U.S.C., Section 1486, and 5 U.S.C., Section 1009(b).

Petitioners, Dunes Hotel, Trans-Global and Catalina, have their principal places of business within this judicial circuit. The Dunes Hotel was incorporated in Nevada, and Trans-Global and Catalina were incorporated in California. Each of these petitioners "reside" within this judicial circuit. Petitioners, Rich and Miller, reside in Los Angeles, California.

The venue of this petition is fixed by 49 U.S.C., Section 1486(b), which provides that the petition shall be filed in the judicial circuit where the petitioner resides, or has his principal place of business. Venue is properly laid before this court.

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[3]The C-46 Company was not a respondent before the Board. No order has been issued against it.

Grounds on Which Relief Is Sought

The Dunes Hotel offers free air transportation between Los Angeles, California, and Las Vegas, Nevada, to its guests in Los Angeles, California. The free air transportation is part of the Dunes Magic Carpet Tour package. Trans-Global and Catalina operated aircraft employed in the tour operations. The Board has found that the Dunes, Trans-Global and Catalina operated as common carriers by air, that the flights were held out and offered to the general public, and that the flights were performed for compensation or hire. The Board enjoined the Dunes, Trans-Global and Catalina, from continuing to offer, provide, or operate these flights. Petitioners, Rich and Miller, were similarly enjoined, presumably by virtue of their association with Trans-Global, and their participation as partners in the C-46 Company, the owner of two aircraft which were employed in performing some of the flights.

Petitioners assert the following grounds as their several basis for the relief sought:

1. The Board erroneously found that the flights constitute common carriage, and that the petitioners are common carriers by air. The uncontradicted evidence of record establishes the contrary, in the following respects:

(a) The flights were held out only to bona fide guests of the Dunes Hotel.

(b) Only guests of the Dunes Hotel were permitted to, and in fact took the flights.

(c) The flights were offered without charge to guests of the Dunes Hotel.

(d) Patrons of the flight were transported free of charge.

(e) The flights were not operated for profit or compensation.

(f) The flights were not operated with the motive or purpose to profit.

(g) The flights were operated in the conduct or furtherance of the resort hotel business of the Dunes Hotel.

(h) The flights were incidental to the primary hotel business of the Dunes Hotel.

2. Although the Board's Hearing Examiner found, (1) that the flights were in furtherance of the hotel business of the Dunes, and (2) that the primary business of the Dunes was the operation of a resort hotel, the Board erroneously found that the flight operations were "interstate air transportation."[4] The evidence of record, and the Examiner's findings, required the Board to hold that the flights were in "interstate air commerce"[5] and beyond the economic regulatory authority of the Board.

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[4]49 U.S.C., Section 1301(21).

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[5]49 U.S.C., Section 1301(20).

3. The Board erroneously issued a Cease and Desist Order against Catalina, although Catalina had terminated its participation in the operation of the flights, and had ceased operations entirely for a substantial period of time prior to the Board's Order. As a matter of law the Board was required to grant Catalina's motion to dismiss the proceeding as against Catalina.

4. The Board committed prejudicial legal error in admitting evidence of events which occurred prior to the effective date of the applicable provisions of the Federal Aviation Act of 1958. The complaint of the Bureau of Enforcement alleged violations of the Federal Aviation Act of 1958. The applicable provisions of this Act did not become effective until January 1, 1959. Nevertheless, the Board admitted in evidence, considered, and relied on evidence of events which occurred prior to January 1, 1959.

5. The issuance of a Cease and Desist Order against petitioners Rich and Miller is beyond the authority and jurisdiction of the Board. Petitioners, Rich and Miller, were erroneously designated as respondents in the administrative proceeding, because the Bureau of Enforcement mistakenly believed that these individual petitioners were partners engaging in the operation of aircraft as Trans-Global Airlines, a partnership. This was corrected by stipulation to show that the operator of the aircraft was petitioner, Trans-Global Airlines, Inc. There is no evidentiary basis whatsoever for the

issuance of a Cease and Desist Order against petitioners Rich and Miller.

6. Petitioners were denied due process, and the Board's Order and Opinion violates the Administrative Procedure Act [5 U.S.C., Section 1007(b)], in the following particulars:

(a) The Board failed to rule on many material exceptions to the Hearing Examiner's Initial Decision, which were filed with the Board by petitioners.

(b) The Board failed to make findings and conclusions upon many material issues of fact and law presented on the record in the administrative proceeding, and to determine or state the reasons or basis for such findings and conclusions.

(c) The Board failed to review the record in the administrative proceeding, and failed to make the findings and conclusions, and determine the reasons and basis therefor, which were set forth in the Board's Order and Opinion; instead, the findings and conclusions, and the reasons and basis therefor, were made and determined by the Opinion Writing Section of the Board.

7. Petitioners were denied due process, and the Board's Order violates the Administrative Procedure Act [5 U.S.C., Section 1006(c)], because harsh economic sanctions were imposed on petitioners by the Board, without considering the record in the administrative proceeding, or such portions of the record as were cited by petitioners.

8. Petitioners were denied due process, and the Board's Order violates the Administrative Procedure Ace [5 U.S.C., Sections 1006(c), 1007(b)] because the sanctions imposed by the Board are not based on the findings and conclusions of the Board. Instead, the Board determined to impose serious economic sanctions upon petitioners, and then directed its Opinion Writing Section to make findings and conclusions which would justify the imposition of the sanctions the Board had already determined to impose on petitioners.

9. Petitioners were denied due process and the Board's Order violated the Administrative Procedure Act [5 U.S.C., Section 1006(c)] because the sanctions imposed on petitioners are not supported by or are not in accordance with reliable, probative, or substantial evidence.

10. The Bureau of Enforcement failed to sustain the burden of proving that petitioners violated the Federal Aviation Act [5 U.S.C., Section 1006(c)].

11. The Board's findings of violations by petitioners are arbitrary and capricious and constitute an abuse of discretion, are not in accordance with law, are without observance of precedure required by law, and are unsupported by substantial evidence on the record considered as a whole, including conflicting evidence and evidence from which conflicting inferences could and should be drawn.

12. The Board's order is arbitrary, capricious, constitutes an abuse of discretion, is not in accord-

ance with law, is contrary to constitutional rights, power, privilege, immunity, is in excess of statutory jurisdiction, authority and limitation, is short of statutory rights, is without observance of procedure required by law, and is not supported by substantial evidence on the record considered as a whole, including conflicting inferences and evidence from which conflicting inferences could and should be drawn.

13. The Board's Order is based on unsubstantial, inadmissible, non-probative and untrustworthy evidence.

The Relief Prayed

Wherefore, petitioners pray that this Court review the order of the Civil Aeronautics Board complained of, and that this Court order:

1. That the Board's order be set aside, or,

2. That the Board's order be remanded to the Board for further proceedings in accordance with law, and

3. That the Board's order be stayed pending final determination of this petition, and for such other and further relief as to the Court may seem just.

KEATINGE AND OLDER,

By /s/ ROLAND E. GINSBURG,
Attorneys for Petitioners.

[Endorsed]: Filed March 28, 1961.

[Title of Court of Appeals and Cause.]

PETITIONERS' STATEMENT OF POINTS

Petitioners, M & R Investment Company, Inc., d/b/a Dunes Hotel and Casino, Catalina Air Transport, d/b/a Catalina Airlines, Trans-Global Airlines and Don Rich and Fred Miller, hereby file the following Statement of Points upon which they intend to rely on review:

1. The Board improperly and erroneously relied on evidence of events which occurred prior to January 1, 1959, the effective date of the applicable provisions of the Federal Aviation Act of 1958 (49 U.S.C.A., Section 1301, et seq.).

2. The Board erroneously found that flights operated by petitioners constituted common carriage by air.

3. The Board erroneously found that petitioners are common carriers by air.

4. The Board erroneously failed to find the following, although the evidence of record compels such findings:

(a) Flights were held out only to bona fide guests of the Dunes Hotel.

(b) Only guests of the Dunes Hotel were permitted to board the flights.

(c) Only guests of the Dunes Hotel took the flights; all others were excluded.

(d) Flights were offered without charge to guests of the Dunes Hotel.

(e) Patrons of the flight were transported without charge.

(f) The flights were not operated for profit or compensation, or with the motive or purpose to profit.

(g) The flights were incidental to the primary hotel business of the Dunes Hotel.

(h) The flights were operated in the conduct or furtherance of the resort hotel business of the Dunes.

(i) The primary business of the Dunes was the operation of a resort hotel.

5. The Board erroneously found that the flights were operated in "interstate air transportation." (49 U.S.C., Section 1301(21)), although the evidence of record compels the finding that the flights were operated in interstate air commerce. (49 U.S.C., Section 1301(20)).

6. The flight operations were beyond the economic regulatory authority of the Board.

7. The Board erroneously ordered Catalina Air Transport to cease and desist because Catalina had terminated its participation in the flight operations a substantial period of time prior to the Board's order.

8. The Board's cease and desist order erroneously included a prohibition against flight operations in overseas and foreign air transportation which had not been performed by petitioners.

9. The Board erroneously ordered petitioners, Rich and Miller, to cease and desist from engaging in air transportation. The record conclusively establishes that petitioners Rich and Miller were not engaged in air transportation activities as individuals; these individual petitioners were removed as respondents in the administrative proceeding by stipulation of the parties appearing of record. There is no evidentiary or other basis for the issuance of a cease and desist order against petitioners, Rich and Miller.

10. Petitioners were denied due process, and the Board's Order and Opinion violates the Administrative Procedure Act (5 U.S.C., Section 1007(b)), in the following particulars:

(a) The Board failed to rule on many material exceptions to the Hearing Examiner's Initial Decision, which were filed with the Board by petitioners.

(b) The Board failed to make findings and conclusions upon many material issues of fact and law presented on the record in the administrative proceeding, and to determine or state the reasons or basis for such findings and conclusions.

(c) The Board failed to review the record in the administrative proceeding, and failed to make the findings and conclusions, and determine the reasons and basis therefor, which were set forth in the Board's Order and Opinion; instead, the findings and conclusions, and the reasons and basis therefor, were made and determined by the Opinion Writing Section of the Board.

11. Petitioners were denied due process, and the Board's Order violates the Administrative Procedure Act (5 U.S.C., Section 1006(c)), because harsh economic sanctions were imposed on petitioners by the Board, without considering the record in the administrative proceeding, or such portions of the record as were cited by petitioners.

12. Petitioners were denied due process, and the Board's Order violates the Administrative Procedure Act (5 U.S.C., Section 1006(c), 1007(b)) because the sanctions imposed by the Board are not based on the findings and conclusions of the Board. Instead, the Board determined to impose serious economic sanctions upon petitioners, and then directed its Opinion Writing Section to make findings and conclusions which would justify the imposition of the sanctions the Board had already determined to impose on petitioners.

13. Petitioners were denied due process and the Board's Order violated the Administrative Procedure Act (5 U.S.C., Section 1006(c)) because the sanctions imposed on petitioners are not supported by or are not in accordance with reliable, probative, or substantial evidence.

14. The Bureau of Enforcement failed to sustain the burden of proving that petitioners violated the Federal Aviation Act, (5 U.S.C., Section 1006(c)).

15. The Board's findings of violations by petitioners are arbitrary and capricious and constitute an abuse of discretion, are not in accordance with law, and are unsupported by substantial evidence on

the record considered as a whole, including conflicting evidence and evidence from which conflicting inferences could and should be drawn.

16. The Board's order is arbitrary, capricious, constitutes an abuse of discretion, is not in accordance with law, is contrary to constitutional rights, power, privilege, immunity, is in excess of statutory jurisdiction, authority and limitation, is short of statutory rights, is without observance of procedure required by law, and is not supported by substantial evidence on the record considered as a whole, including conflicting inferences and evidence from which conflicting inferences could and should be drawn.

17. The Board's order is based on unsubstantial, inadmissible, non-probative and untrustworthy evidence.

The Relief Prayed

Wherefore, petitioners pray that this Court review the order of the Civil Aeronautics Board complained of, and that this Court order:

1. That the Board's order be set aside, or,

2. That the Board's order be remanded to the Board for further proceedings in accordance with law, and for such other and further relief as to the Court may seem just.

KEATINGE AND OLDER,

By /s/ ROLAND E. GINSBURG,
Attorneys for Petitioners.

[Endorsed]: Filed July 21, 1961.

[Title of Court of Appeals and Cause.]

MOTION TO SUBSTITUTE PORTIONS OF THE RECORD IN TYPEWRITTEN OR MIMEOGRAPHED FORM

Pursuant to the provisions of Rule 37 of the Rules of this Court, Petitioners hereby file their motion to substitute portions of the printed record in typewritten or mimeographed form and in support thereof allege as follows:

1. Petitioners filed a petition with this Court to review an order[1] of the Respondent, the Civil Aeronautics Board, under the provisions of 49 U.S.C., Section 1486.

2. Petitioners filed their statement of points with this Court on or about July 21, 1961. Petitioners will file their designation of record with this Court on November 10, 1961.

3. Petitioners desire to reduce the expense for printing the portions of the record designated by Petitioners. For this reason, Petitioners request authorization from this Court to file certain designated portions of the record in typewritten or mimeographed form. Petitioners have received from the Board copies of a large number of documents which Petitioners have included in the designation of record. These documents, and the number of pages contained in each such document are as follows:

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[1]Order No. E-16331, issued February 1, 1961. A copy of this Order is atached to the Petition for Review as Exhibit "A."

Document	Number of Pages
Petition for Enforcement, June 15, 1959	1
Complaint of Compliance Attorney, June 15, 1959	5
Motion to Dismiss Complaint, July 20, 1959	8
Answer of M&R Investment Co., Inc. July 20, 1959	6
Initial Decision of Hearing Examiner, July 27, 1960	38
Exceptions of Respondents to Initial Decision, September 19, 1960	19
Board's Opinion and Order E-16331, February 1, 1961	10
Petition for Rehearing and Reconsideration, February 27, 1961	6
Motion for Stay of Board Order E-16331, March 21, 1961	9
Board Order E-16541, March 22, 1961	3
Total	105

Petitioners estimate that a saving of approximately $350.00 in printing expenses will be realized if this motion is granted.

For the foregoing reasons, Petitioners respectfully request that the following order be issued:

(a) Petitioners be permitted to submit portions of the record in typewritten or mimeographed form, subject to approval by the Clerk of this Court, pursuant to Rule 10(4) of the Rules of this Court.

(b) That this Court make such other and further order as this Court, or a Judge thereof, may deem proper.

Dated, this 9th day of November, 1961.

Respectfully submitted,

KEATINGE AND OLDER,

By /s/ ROLAND E. GINSBURG,
Attorneys for Petitioners.

So Ordered: November 10, 1961.

Subject to reconsideration if any objection filed within 7 days.

/s/ RICHARD H. CHAMBERS,
Judge.

[Endorsed]: Filed November 10, 1961.

No. 17315

United States
COURT OF APPEALS
for the Ninth Circuit

SAFEWAY STORES, INCORPORATED,
Appellant,

v.

MARVIN FANNAN,
Appellee,

and

MARVIN FANNAN,
Appellant,

v.

SAFEWAY STORES, INCORPORATED,
Appellee.

OPENING BRIEF OF APPELLANT SAFEWAY STORES, INCORPORATED, ON ITS APPEAL AND ITS ANSWER TO BRIEF OF APPELLANT MARVIN FANNAN

Appeals from the United States District Court for the District of Oregon.

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Attorneys for Appellee and Appellant, Safeway Stores, Incorporated.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 8-61

SUBJECT INDEX

TABLE OF CASES

TABLE OF CASES (Cont.)

FEDERAL RULES CITED

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No. 17315

United States
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SAFEWAY STORES, INCORPORATED,
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OPENING BRIEF OF APPELLANT SAFEWAY STORES, INCORPORATED, ON ITS APPEAL AND ITS ANSWER TO BRIEF OF APPELLANT MARVIN FANNAN

Appeals from the United States District Court for the District of Oregon.

PRELIMINARY COMMENT

Both parties have appealed from the trial court's judgment of dismissal without prejudice under Rule 41, the appellant Marvin Fannan claiming that the order should not have been entered at all, and the appellant

Safeway Stores, Incorporated, claiming that it should have been a dismissal with prejudice because only that type of dismissal would have the same effect as a judgment based on a directed verdict for which the appellant Safeway Stores had moved at the trial of the cause and to which it claims it was entitled. The appellant Marvin Fannan has previously lodged his opening brief and in this brief of appellant Safeway Stores, Incorporated we will first discuss the error, if any, resulting from the trial court's failure to grant defendant's motion for a directed verdict as made by the defendant and thereafter will answer the brief of appellant Marvin Fannan.

SUPPLEMENTAL STATEMENT OF THE CASE

The basis of jurisdiction and statement of the case as set forth on pages 1-3 of the Fannan brief are correct. The following additional facts are set forth.

At the conclusion of the plaintiff's evidence the defendant moved the court for an order directing the jury to return a verdict in its favor. Specific grounds for the motion were set forth (R. 54).[1] After argument the court stated, "I grant the motion for dismissal." (Tr. 61-62). The court gave no indication that the dismissal was to be without prejudice.

Two days later the defendant presented a formal

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[1] Attention of the Court is invited to the fact that the remarks beginning in the final paragraph at the bottom of page 57 of the Transcript of Record are those of Mr. Wilson, attorney for the plaintiff, and not those of Mr. Tooze, defendant's attorney, as the record erroneously indicates.

order dismissing the case. The trial court, at the end of the order, added (in pen and ink) the words "without prejudice".

The defendant later moved the court to amend the judgment by striking the words "without prejudice". This motion was denied (R. 10-12).

SPECIFICATION OF ERROR

The court erred in dismissing the action without prejudice under Rule 41, Federal Rules of Civil Procedure, in view of the fact that the only motion by the defendant at the conclusion of plaintiff's case was for a directed verdict under Rule 50, Federal Rules of Civil Procedure. The appropriate action should have been for a directed verdict and a judgment based thereon, or at all events a dismissal with prejudice which would have the same effect—as an adjudication on the merits. The court repeated this error by denying defendant's motion to amend the judgment by eliminating therefrom the words "without prejudice".

SUMMARY OF ARGUMENT

A motion for a directed verdict under Rule 50(a) cannot be converted by the court into a motion for dismissal without prejudice under Rule 41(b). No such discretion is vested in the trial court.

ARGUMENT OF APPELLANT SAFEWAY STORES, INCORPORATED, ON ITS APPEAL

The issue on defendant's appeal is clear. Does a trial court, after the defendant has properly moved for a directed verdict under Rule 50 on the ground that the plaintiff's evidence is insufficient as a matter of law have the authority to grant a dismissal without prejudice under Rule 41?

After a plaintiff has rested, and his evidence is legally insufficient to go to the jury, a defendant has two alternatives. He may move for a directed verdict under Rule 50(a) or he may move for an order of involuntary dismissal under Rule 41(b). In a jury case, the "more appropriate procedure" is a motion for directed verdict, *Kingston* v. *McGrath,* 232 F.2d 495 (9 C.A., 1956).

Circuit Judge Stephens, in *U. S.* v. *U. S. Gypsum Co.,* 67 F. Supp. 397, reversed on other grounds, 68 S. Ct. 525, 333 U.S. 364, 93 L. Ed. 746; rehearing denied, 68 S. Ct. 788, 333 U.S. 869, 92 L Ed 1147, compared Rule 41(b) and Rule 50(a) as follows:

> " . . . Motions under Rules 41(b) and 50(a) are similar in that a motion under either rule leaves the defendant with a right to present his own case if the decision on his motion goes against him; and the motions under the two rules are similar in that both provide a defendant with a method of mid-trial attack upon the plaintiff's case, and a means of determining whether or not the defendant must present his evidence. But beyond these likenesses, motions under Rule 41(b) and Rule 50(a) should be assimilated only so far as is consonant

> with reason and with the spirit of the Federal Rules of Civil Procedure. . ."

Defendant submits that, having moved for a directed verdict, the trial court had no alternative but to either allow or deny defendant's motion.

Defendant has been unable to find a single federal case exactly in point. However, some federal decisions have obliquely touched upon the question.

In *Johnson* v. *N. Y., N. H. and H. R. Co.,* 344 U.S. 48, 73 S. Ct. 125, 97 L. Ed. 77 (1952) the plaintiff brought an action for wrongful death of her husband under the Jones Act. After the evidence was in the defendant moved to dismiss the complaint and also asked for a directed verdict. The trial court reserved decision on the motion (as authorized by Rule 50) and after a jury verdict and judgment against the defendant, the defendant moved to set aside the verdict. This was denied.

On appeal to the Supreme Court of the United States the defendant claimed that the final order should be an order of judgment for the defendant notwithstanding the verdict, rather than for a new trial. The court held, speaking through Justice Black:

> "Respondent's motion should be treated as nothing but what it actually was, one to set aside the verdict—not one to enter judgment notwithstanding the verdict."

Another case supporting the defendant's position herein is *Wight* v. *United Pacific Insurance Co., et al,* 154 F. Supp. 548 (D.C., Utah). This decision of course is

not binding upon this court, coming as it does from a lower court, but the reasoning of the trial court is convincing. In that case the plaintiffs moved to dismiss the suit without prejudice under Rule 41(a). One of the defendants consented to such a dismissal but the other defendant (United Pacific) moved for a dismissal upon terms. The plaintiffs contended that the dismissal should be without prejudice. The trial court held:

> ". . . The other parties cannot convert a motion made under another subdivision of Rule 41 into an agreement to dismiss under subdivision (a) (1) (ii) by consenting to a dismissal under the latter subdivision unless all parties consent to that particular type of dismissal. United Pacific has not done so, but relies upon the grounds stated in its original motion. . . "

The court then dismissed the case on terms.

In *International Shoe Co.* v. *Cool,* 154 F.2d 778 (8 C.A., 1946) the defendant moved for a directed verdict at the conclusion of the plaintiff's case in a trial had before a jury. The motion was argued and the court indicated its intention to sustain the motion. Thereupon the plaintiff moved for a voluntary dismissal. This was granted, the effect of which was a dismissal without prejudice. [The effect of the trial court's ruling in the case at bar was identical. Thus, the cases are in substance identical].

On appeal it was held that the trial court erred in thus dismissing the plaintiff's case and the judgment was reversed with directions to enter judgment dismissing the plaintiff's action, the court saying:

"At most, the discretion vested in the court is

> a judicial and not an arbitrary one and does not warrant a disregard of well settled principles of procedure . . . There is nothing to indicate that any further evidence might be produced, nor were there any procedural grounds for such dismissal."

See also *Conway* v. *O'Brien,* 111 F.2d 611 (2 C.A., 1940); *Massachusetts Protective Association* v. *Mouber,* 110 F.2d 203 (8 C.A., 1940).

Since, as the trial court concluded, the plaintiff's evidence was, as a matter of law, insufficient, then it is submitted that by the mandate of this court the lower court should be directed to vacate the judgment dismissing the action without prejudice and to enter an unconditional order dismissing the action with prejudice. Such action would be tantamount to a directed verdict and a judgment based thereon, to which the defendant was entitled.

SUMMARY OF ARGUMENT IN ANSWER TO BRIEF OF APPELLANT MARVIN FANNAN

The plaintiff's theory is that because the plaintiff was the first patron in the defendant's store, either the pencil was on the floor long enough for the defendant in the exercise of due care to discover and remove it, or the pencil was placed or dropped thereon by a Safeway employee. There is certainly no affirmative evidence supporting either alternative. Yet plaintiff claims that it would be proper for the matter to be sumitted to a jury; that a jury could find negligence under his "either-or" theory.

Plaintiff's theory overlooks these points:

(1) If plaintiff relies on the second alternative he must prove that the pencil was either *placed* on the floor or *negligently dropped* by a Safeway employee *in the scope of his employment*. There is no evidence whatever relative to any of these requirements.

(2) The pencil might have been accidentally dropped, in which case there would be no liability unless it were there long enough for the defendant in the exercise of due care to have discovered and removed it and the jury found that its presence created an unreasonable risk.

(3) The plaintiff's "either-or" theory is valid only so long as it appears that his two proposed alternatives are the *only* possible alternatives. Other alternatives, consistent with the evidence are present in this case, and thus, to submit the case to the jury would allow them to speculate on whether or not defendant was negligent.

ARGUMENT IN ANSWER TO BRIEF OF APPELLANT MARVIN FANNAN

A. Plaintiff's case summarized.

The evidence in this case is that the plaintiff and his sister were the first patrons to enter the defendant's store (R. 21, 28). The plaintiff claims he fell on a black, shiny marking pencil with a screw top as he was nearing the rear of the store (R. 18, 20, 27, 30). The manager told the meat man: "Go pick that

up. One man's already been hurt." (R. 29-30). The pencil, after being picked up, was placed in the pocket of the manager (R. 20, 29, 30). No inference can be drawn from these facts that the manager was claiming that the pencil was his or Safeway's. In fact, the words: "One man's already been hurt" created the inference only that the manager wanted to remove an obstacle that had already caused an injury. The same comment and the same conduct on the part of the manager would have been appropriate if the object had been a pebble on the floor.

From these facts the plaintiff claims that ". . . [Either] the pencil had been there all night, a sufficient length of time for the defendant to have discovered it, or, if it had not been there all night, it had been dropped there by a Safeway employee." (Plaintiff's Brief, page 4).

B. Oregon law stated.

The Oregon rule relative to cases such as this is stated in the case of *Cowden* v. *Earley,* 214 Or. 384 at 387, 327 P.2d 1109 at 1111:

> "The rule of law applying to a case of this kind is well established. An invitee who is injured by slipping on a foreign substance on the floor or stairs of business property must, in order to recover from the occupant having control of said property, show either:
>
> "(a) That the substance was *placed* there by the occupant, or
>
> "(b) That the occupant knew that the substance was there and failed to use reasonable diligence to remove it, or

"(c) That the foreign substance had been there for such a length of time that the occupant should, by the exercise of reasonable diligence, have discovered and removed it." (Italics supplied)

C. Plaintiff's theory analyzed.

There is not a shred of evidence in this case as to how or when this pencil came to be on the floor, or from what source it came. Notwithstanding this fact, the plaintiff argues that the pencil either had to be there overnight, in which case the defendant knew or should have known of its existence, or that the defendant, or its agents, dropped it.

Regarding the first of these alternatives, there is no evidence whatever that the pencil had been in the store overnight and, in fact, no evidence as to whether it had been on the floor one minute, five minutes or longer. Regarding the second alternative, there is no evidence that any of the defendant's employees placed it there, that it was a pencil owned by Safeway or any of its employees, or that it was placed or dropped by any Safeway employee in the course of his employment. Thus it is seen that there is no evidence in itself sufficient to fulfill any *one* of the requirements of *Cowden* v. *Earley,* supra. Yet plaintiff reasons that from the fact that the pencil was on the floor and from the fact that the plaintiff was the first customer in the store, the pencil either had been there long enough to be discovered, or it *had* to be a Safeway pencil or one dropped by an employee of Safeway.

The pencil which he claims caused his fall was

described by the plaintiff on direct examination as a black shiny pencil; that it was just "a round, pretty heavy pencil with a little screw apparatus on top, the one I seen". (R. 20). On cross-examination he described it as a grease pencil with a screw top used for marking merchandise with which he was familiar having used a similar pencil in his father's store (R. 22). His sister, Mrs. Perrigo, described it as black and shiny, "five or six inches long, I guess, or something like that. Black-like, kind of slick looking like plastic." (R. 30). Plaintiff on page 6 of his brief describes the pencil as "a black shiny pencil, described as round and pretty heavy, with a little screw apparatus on top [R. 20, 30]."

On page 10 of the plaintiff's brief, however, plaintiff makes the statement that "Mr. Steinsiek testified that his own pencil, Exhibit 6E, which was similar to the type of pencil described by plaintiff and his sister, was not a common type of pencil, and was the same type used for making banners that Safeway uses in its stores, which were made by an employee right in the Tillamook store (R. 46-47)." Plaintiff using this statement as a premise then argues that: "This evidence would be sufficient to take to the jury the issue of whether or not the pencil was a Safeway pencil, and hence presumably dropped by a Safeway employee."

In the first place the comment that Exhibit 6E is similar to the type of pencil described by the plaintiff and his sister is wholly unfounded. An inspection of Exhibit 6E will show that it is a pencil with a wooden, not a plastic, casing and in the second place it does not

have a screw top. In the third place the statement of the plaintiff to the effect that Steinsiek testified that Exhibit 6E was the same type used by Safeway in making banners that Safeway uses in its stores is not correct. He did not testify that Safeway used such a pencil in making banners. In fact he testified otherwise:

> "Q. And is that type of pencil what you would use in making Safeway banners?
>
> A. Not everyone uses that type of pencil, but I use it for that purpose." (R. 47).

And lastly, Steinsiek said that the pencil, Exhibit 6E, was an art pencil used not only for paper banners but also for show cards, or other rough surfaces, like a rough piece of plyboard, or a concrete wall (R. 46-47). He did not identify it as a grease pencil used for marking merchandise.

Plaintiff further argues that, notwithstanding the fact that there is no evidence supporting either of his two alternatives (i.e. that the pencil had been on the floor long enough to charge the defendant with constructive notice of it or that an employee of defendant had dropped it) nevertheless no other alternative exists and the jury should be permitted to find an inference of negligence, whichever alternative it found to exist. Let us test the plaintiff's position against the principles of logic and law.

There is no question but that if there was evidence that the pencil had been on the floor since the previous night a jury's finding that the defendant was negligent would be unassailable. That is one extreme under which the defendant might be found to be liable (Point C. of

Cowden v. *Early*). At the other end of the spectrum we find a situation illustrated by the case of *Miller* v. *Safeway Stores, Incorporated,* 219 Or. 139, 312 P.2d 577, 346 P.2d 647 (1959). In that case the plaintiff, a customer in the defendant's store, tripped on a carton which protruded into the aisle. There was a verdict and judgment for the defendant. On appeal the judgment was affirmed. The Oregon court specifically noted that this was the type of case that comes within point (a) of *Cowden* v. *Early,* supra, because the defendant admitted that the boxes were *placed* there by its employees. Thus, there was no question about the defendant's knowledge. The case at bar obviously does not come within the holding of the *Miller* case, because the source from which the pencil came, and the identity of the person who dropped the pencil remain unascertained. No inference can be drawn that anyone *placed* the pencil on the floor.

Also there is a type of case in which an employee negligently permits foreign matter to be left upon the surface. Illustrative of that type of case is *Eitel* v. *Times, Inc.,* 221 Or. 585, 352 P.2d 485 (1960). In that case recovery for the plaintiff was sustained when the evidence showed that the defendant knew that its newsboys were leaving wires from bundles of newspapers on the sidewalk. The court held that there was sufficient evidence to charge the defendant with negligence in knowingly creating a hazardous situation.

In both cases, *Miller* v. *Safeway,* and *Eitel* v. *Times,* supra, there was evidence that the defendant either

knew, or in the exercise of reasonable care should have known, that the objects were upon the floor or sidewalk. No such evidence appears either directly or inferentially in the case at bar.

We submit that the evidence in this case, viewed in the light most favorable to the plaintiff, is wholly insufficient to bring this action within either type of case, that is, where the article was on the floor for such a length of time that the defendant in the exercise of due care, should have known of and removed it, or where the article was either placed there by the defendant or the defendant *negligently* caused it to be there.

For the plaintiff to recover under his "either-or" theory, he must *prove* that the object had been there for such a length of time that defendant knew or in the exercise of reasonable care should have known of it, or that the defendant placed the object on the floor or negligently dropped it thereon. Any hypothesis consistent with the evidence which does not come within plaintiff's "either-or" theory dooms his case.

D. There is a complete lack of evidence that the pencil was on the floor because of the negligence of an employee of the defendant.

A case which illustrates this point exactly is *Quinn* v. *Utah Gas & Coke Co.*, 42 Utah 113, 129 P. 362 (1912). That was an action for damages to the clothing of the plaintiff, a customer in the defendant's office. The evidence was that the plaintiff went to pay her gas bill at the defendant's office where the customers handed their payments through an opening in a wire screen

on the other side of which was the defendant's cashier. The plaintiff waited in line, paid her bill, and then found ink upon her clothing from a spilled ink bottle. There was no evidence as to how or when the ink was spilled or by whom. There was a verdict and judgment for the plaintiff. The defendant appealed.

On appeal the judgment was reversed, the court holding (129 P. at 364):

> "In the case at bar there is not the slightest evidence with respect to who overturned the ink bottle, or how or where it was overturned. . .
>
> * * *
>
> "At most, therefore, the case falls within the familiar doctrine that 'when a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to show neither' [citing cases]. Is it not just as reasonable to infer that the ink was accidentally spilled as to infer that it was negligently done? . . . The inference that the spilling of the ink was accidental is, in our judgment, much stronger than the inference that it was otherwise. Under such circumstances a finding of negligence can only be based upon conjecture."

To the same effect is *Carpenter* v. *Herpolsheimer's Co.*, 278 Mich. 697, 271 N.W. 575. In that case the plaintiff was a customer in the defendant's store and was injured when she stepped in a box in the middle of the aisle. The box looked like a box that possibly had had large purses in it. The evidence showed that in the center of the aisle, a few feet away, empty boxes were piled under the table by clerks.

In denying recovery, the court said (271 N.W. at 575):

> ". . . The difficulty with plaintiff's case is that there was no evidence that the box which she claims was in the aisle and tripped her was a purse box; nor, if it was, that it had been piled negligently under the table; nor how it got in the aisle; nor that defendant had knowledge of its being there; nor that it was in the aisle long enough so that defendant should have known of it."

To the same effect is *Whentz* v. *J. J. Newberry Co.,* 245 App. Div. 790, 280 N.Y. Supp. 824 and *Hill* v. *Castner-Knott Dry Goods Co.,* 25 Tenn. App. 230, 166 S.W.2d 638.

Searching for cases on all fours with the case at bar has revealed no case precisely in point. The only case found by defendant involving a pencil is that cited by plaintiff in his brief, *The Vogue, Inc.* v. *Cox,* 28 Tenn App. 344, 119 S.W.2d 307. In that case the plaintiff fell on a pencil lying on the floor of the defendant's store near a wrapping counter. Immediately after the plaintiff fell, the saleslady who had been waiting on her came up and said, "That is my pencil," and stuck it in her hair.

On these facts, the Tennessee court held that the plaintiff had made out a prima facie case; that the fact the saleslady claimed the pencil as hers unaided by any other circumstances, raised an inference that she had dropped it and knew it was there. (No such evidence has been produced in the instant case).

The language in the case which is pertinent in this case is (119 S.W.2d at 310):

> "The gist of this charge is that the pencil was negligently allowed to remain on the floor and

> we do not see that defendant has been injured by the suggestion carried by the declaration that it got there in a manner different from that shown by the proof. *It was not negligence to drop a pencil on the floor, but it was negligence to allow it to remain there.*" (emphasis added)

From the sentence emphasized above, it is seen that the court based its decision in that case upon the evidence that the employee *knew* that she had dropped the pencil, the negligence being the failure to pick it up rather than any fault in dropping it in the first instance.

Plaintiff must also prove, if he is to rely on a theory that the pencil was dropped or placed on the floor by an employee, that the pencil was placed or negligently dropped on the floor by an employee *in the scope of his employment*. There is a complete lack of evidence that the pencil involved here was either placed on the floor by an employee of defendant or negligently dropped onto the floor. Moreover, there is no showing that even were the pencil so placed or dropped, that the employee had done so in the scope of his employment.

As stated in the case of *Quinn* v. *Utah Gas & Coke Co.*, 42 Utah 113, 129 P. 362, which has been previously discussed by us, it is entirely possible that the pencil was accidentally dropped. ["Is it not just as reasonable to infer that the ink was accidentally spilled as to infer that it was negligently done?" . . . 129 P. 362 at 364].

Before the rule of *respondeat superior* may be applied, ". . . it must be shown that the relationship of

principal and agent or master and servant existed at the time the damage was done, and that the servant was acting in the course of his employment . . ." *Hantke* v. *Harris Ice Machine Works,* 152 Or. 564, 54 P.2d 293. Accord: *Jacobson* v. *Kirn,* 192 Va. 352, 64 S.E.2d 755; *Kohlman* v. *Hyland,* 54 N.D. 710, 210 N.W. 643, 50 A.L.R. 1437; *White Oak Coal Co.* v. *Rivoux,* 88 Ohio St. 18, 102 N.E. 302, 46 L.R.A. (N.S.) 1091, Ann. Cas. 1914 C. 1082; *Obertoni* v. *Boston & M. R. R.,* 186 Mass. 481, 71 N.E. 980.

In the *Obertoni* case, just cited, the plaintiff, a boy 8 years old, was injured when, after he found a signal torpedo at a grade crossing, he took it home, cracked it with a rock and was hurt. The evidence showed that two of the defendant's employees had been playing catch with the torpedo and left it at the crossing. The court, in denying recovery to the plaintiff, held, first, that there was no evidence that the employees were acting in the scope of their employment, and second, that there was no evidence the torpedo was there through the negligence of the defendant.

> "The fact that it was a railroad's signal torpedo warranted the inference that it was left on the crossing by someone who took it from the defendant railroad, but did not warrant the further inference that it came there through some negligence of the defendant, or its employes . . . It is equally probable that it was taken from the railroad by a stranger or by an employe for some purpose of his own . . . The burden is on the plaintiff to prove that it came there by act of the defendant or its employes in the course of its business . . ." 71 N.E. at 981.

The fallacy of the plaintiff's case is seen from the

statement on pages 8 and 9 of his brief as follows:

> "If one of defendant's employees dropped the pencil, it is clear that the defendant can be held liable for their conduct, even without proof of the length of time which the pencil had been on the floor . . ."

This is simply not the law, for it overlooks the requirements that the employee must be acting in the scope of his employment and that there must be some evidence that the pencil was negligently or intentionally dropped. The pencil might well have been dropped by an employee on his way to work, it might have been dropped by a tradesman delivering merchandise, or it might have been *accidentally* dropped by an employee, even though he was working in the scope of his employment. Moreover, even had the plaintiff shown that the pencil had been dropped by one of the defendant's employees, that would not prove either that the employee was in the scope of his employment, or that the pencil had been negligently dropped.

This is not a case of res ipsa loquitur. In effect, plaintiff is attempting to bring it within that rule.

For additional support on this point see *Whentz* v. *J. J. Newberry Co.,* 245 App. Div. 790, 280 N.Y. Supp. 824; 34 Am. Jur., Master and Servant, § 552; *Prushensky* v. *Pucilowsky,* 269 Mass. 477, 169 N.E. 422.

There is no evidence tending to show that the defendant had either actual or constructive knowledge of the pencil being on the floor. *Rowbottom* v. *U. P. Coal Co.,* 39 Utah 408, 117 P. 871; *Jenson* v. *H. S. Kress & Co.,* 87 Utah 434, 49 P.2d 958.

Notice is a fact to be proved, like all other facts, by direct proof of the fact itself, or by proof of circumstances from which the fact may be reasonably inferred. *Jacobson* v. *Kirn,* 192 Va. 352, 64 S.E.2d 755. There simply is no evidence from which it can be inferred either that the defendant knew that the object was on the floor, or that in the exercise of reasonable care it should have known that the object was on the floor, or that the defendant intentionally placed or negligently dropped the object upon the floor.

CONCLUSION

The plaintiff's "either-or" theory fails because, first, there is no evidence supporting either alternative, and, secondly the evidence is consistent as well with the hypothesis that Safeway did not create the condition, had no notice, actual or constructive, thereof, and that neither Safeway nor any of its employees negligently caused the pencil to be in the aisleway.

Respectfully submitted,

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APPENDIX

EXHIBITS

	Identified (Page of Tr.)	Offered (Page of Tr.)	Received (Page of Tr.)
Plaintiff's Exhibits			
No. 1 (A-B—X-rays of Plaintiff	50	50	51
No. 2—Deposition of Raymond Strawn			
No. 3—Deposition of Walt Steinsiek	32	50	51
No. 4—Hospital Records, St. Vincent's Hospital	51	51	51
No. 5—Hospital Records, Providence Hospital	51	51	51
No. 6 A—Coveralls	44	50	51
No. 6 B—Green Plastic Pencil	44	50	51
No. 6 C—Black Plastic Pencil	44	50	51
No. 6 D—Wooden Pencil	44	50	51
No. 6 E—Short Wooden Pencil	44	50	51
No. 7—Model of left leg		50	51

No. 17315

United States
COURT OF APPEALS
for the Ninth Circuit

SAFEWAY STORES, INCORPORATED,
Appellant,

v.

MARVIN FANNAN,
Appellee,

and

MARVIN FANNAN,
Appellant,

v.

SAFEWAY STORES, INCORPORATED,
Appellee.

BRIEF OF APPELLANT MARVIN FANNAN

Appeals from the United States District Court for the District of Oregon.

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BRIEF OF APPELLANT MARVIN FANNAN

Appeals from the United States District Court for the District of Oregon.

BASIS OF JURISDICTION

This is a diversity action, brought in the Oregon state court and removed to the District Court for the District of Oregon upon the ground of diversity of citizenship. It is stipulated in the pre-trial order, which superseded

the pleadings (R. 8), that plaintiff is a citizen and resident of the State of Oregon, and that defendant is a corporation organized and existing under the law of the State of Maryland with its principal place of business in the State of California and in no other state (R. 3-4). It is also stipulated that the matter in controversy exceeds the sum of $10,000.00 exclusive of interest and costs (R. 3), plaintiff's prayer being for $50,000.00 general damages plus special damages (R. 5-6).

Jurisdiction of the District Court was based upon Title 28, U.S.C. § 1332. Removal was based upon the provisions of Title 28, U.S.C. § 1441 (a).

The cause came on regularly for trial before the Honorable William G. East, District Judge, who entered a judgment of dismissal in favor of defendant on November 16, 1960 (R. 9-10). On December 28, 1960, plaintiff and defendant each filed separate notices of appeal, together with undertakings for costs on appeal (R. 14-15).

This Court has jurisdiction of the appeal under the provisions of Title 28, U.S.C. § 1291.

STATEMENT OF THE CASE

This is an action for damages for personal injuries suffered by plaintiff in slipping on a pencil while a business invitee in defendant's store in Tillamook, Oregon (R. 4-5). At the close of plaintiff's testimony, defendant made a motion for an order directing the jury to return a verdict in its favor (R. 54), and, after

hearing argument, the Court granted a dismissal (R. 61) and subsequently entered the judgment which is the subject of this appeal (R. 9). Defendant has also appealed from this judgment, claiming that it should have been entered with prejudice, but this brief, in accordance with the stipulation entered into in this Court with respect to the order of filing briefs, deals only with plaintiff's appeal from the judgment of dismissal.

The only issue on this appeal, therefore, is whether the trial court erred in dismissing plaintiff's case without submitting it to the jury. It is not entirely clear from the court's comments at the time of granting the motion whether he relied upon the absence of any evidence of negligence, or upon contributory negligence as a matter of law, both of which were grounds for the motion made by defendant (R. 54).

Plaintiffs contends that under applicable Oregon law, and the standards for submission of issues to the jury in federal courts under the provisions of the Constitution of the United States, a question for the jury's decision was clearly presented on both of these issues.

SPECIFICATION OF ERROR

The Court erred in granting defendant's motion made at the close of plaintiff's case, as follows (R. 54):

> "Mr. Tooze. If your Honor please, at this time the plaintiff having rested his case, the defendant moves the Court for an order directing the jury to return a verdict in favor of the defendant for the reasons

and on the grounds that there is no evidence proving or tending to prove that the defendant was negligent in any of the particulars claimed by the plaintiff, or at all; that there is no evidence proving or tending to prove that any act or conduct on the part of the defendant was a proximate cause of any injuries or damages sustained by the plaintiff; on the further ground that the evidence affirmatively shows that the conduct of the plaintiff himself in not paying attention where he was going was negligence as a matter of law which proximately contributed; toward causing his accident and injuries. I would like to argue the motion, your Honor."

After colloquy and argument, the Court stated that he was granting a motion for dismissal (R. 61), and a judgment of dismissal was subsequently entered (R. 9-10).

SUMMARY OF ARGUMENT

The evidence in this case established that plaintiff slipped and fell by reason of stepping on a pencil, lying in the aisle of defendant's store. Plaintiff and his sister were the first and only customers in the store that morning. It must necessarily follow, therefore, either that the pencil had been there all night, a sufficient length of time for the defendant to have discovered it, or, if it had not been there all night, that it had been dropped there by a Safeway employee. Accepting plaintiff's testimony as true, these are the only two possible conclusions. Whichever of them was accepted by the jury, an inference of negligence could properly be drawn therefrom.

The question of whether plaintiff was guilty of contributory negligence in failing to keep a proper lookout was clearly for the jury under applicable law. Plaintiff testified that he was going up the aisle looking for supplies, and stepped on the pencil, which he had not seen.

There being evidence from which the jury could have found negligence on the part of the defendant and an absence of contributory negligence on the part of the plaintiff, the court was in error in taking the case from the jury and dismissing plaintiff's cause of action.

ARGUMENT

A. Statement of Facts.

The facts of this case are simple, and the record extremely short. It is stipulated that defendant is a Maryland corporation, owning and maintaining a store in the City of Tillamook, Oregon (R. 4), and that on or about November 30, 1959, plaintiff fell while a business invitee in said store (R. 4). The evidence established that plaintiff and various members of his family went to the store at about 9:00 or 9:30 in the morning (R. 53-54), just briefly before the store opened (R. 17). They drove to the store (R. 17), where plaintiff and his brother-in-law looked at a truck right across the street from the store until the store opened (R. 17). Plaintiff's sister waited in the car, and advised them when the store opened (R. 17). At the time that plaintiff and his brother-in-law went across the street

to look at the truck, the door of the store had not yet been unlocked (R. 28).

Plaintiff and his sister were the first patrons to enter the store (R. 21, 28). They did not see any other patrons in the store at any time from the time they entered it until they left (R. 21, 28).

Plaintiff and his sister both walked in the door, went through the turnstile, and started up one of the aisles toward the meat market. His sister was in the lead, because plaintiff stopped briefly to pick up some supplies (R. 17-18, 26-27). As plaintiff was heading down the aisle toward the rear of the store, he slipped and fell (R. 18, 27), with his left leg crumpled underneath him (R. 27). The ball of his left foot had struck an object, which rolled backward under it (R. 23-25).

Both plaintiff and his sister identified the object upon which plaintiff stepped as a pencil, which they saw spinning down the aisle immediately after plaintiff fell (R. 19, 29-30). Both plaintiff and his sister saw it while it was still spinning (R. 19, 30). It was a black, shiny pencil, described as round and pretty heavy, with a little screw apparatus on top (R. 20, 30). The manager told the meat man to go pick up the pencil, because one man had already been hurt (R. 29-30), and the meat man picked it up and give it to the manager, who put it in his pocket with some other pencils (R. 20, 29-30).

At no time did plaintiff nor his sister see anyone in the store other than themselves and Safeway employees (R. 21, 28), and plaintiff's sister testified that she was not carrying any kind of pencil with her when she went into the store (R. 28).

The deposition of another witness, Walter R. Steinsiek, who was too disabled to appear in court (R. 39), was also introduced in evidence. This witness had apparently been brought into the case in some manner by the Safeway personnel (R. 37, 41). He had been in that Safeway Store on the day in question (R. 35), but he testified that it was between 10:00 and 11:00 (R. 36), that he positively did not drop any pencils in the store that day, and that all of his pencils were present and accounted for (R. 38). There were three or four others in the store when this witness was there (R. 42), and he produced at the time of the deposition the same pencils that he had at the time plaintiff was injured (R. 43-46).

B. There was substantial evidence that defendant was negligent.

In determining whether or not the evidence in this case was sufficient to go to the jury, it hardly requires reiterating that the applicable standard of examination of the record in a case of this type is that stated by this court in *Sullivan* v. *Shell Oil Company,* 234 F.2d 733, 735 (C.A. 9, 1956), cert. den. 352 U.S. 925, 77 S. Ct. 221, 1 L. Ed. 2d 160, as follows:

> "Upon appeal from a judgment of dismissal entered upon the close of all the evidence, the appellant is entitled to the benefit of every inference which can reasonably be drawn from the evidence viewed in the light most favorable to the cause of action asserted. *Gunning* v. *Cooley,* 1930, 281 U.S. 90, 94, 50 S. Ct. 231, 74 L. Ed. 720; *Schnee* v. *Southern Pacific Co.,* 9 Cir., 1951, 186 F. 2d 745, 746; *Graham* v. *Atchison, T. & S. F. Ry. Co.,* 9 Cir.,

1949, 176 F.2d 819, 823; *Kingston* v. *McGrath,* 9 Cir., 1956, 232 F. 2d 495."

The reason for this rule is inherent in the requirement of jury trial. As the United States Supreme Court stated in the case of *Lavender* v. *Kurn,* 327 U.S. 645, 653, 66 S. Ct. 740, 90 L. Ed. 916 (1946):

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

By this standard, or by any other standard, for that matter, there are only two inferences which are reasonably deducible from the record. Since plaintiff and his sister were the only customers in the store, and did not themselves drop the pencil, either the pencil was dropped by Safeway personnel, or else it had been there since the previous day. From either of these alternatives, an inference of negligence may clearly be drawn, under the applicable authority.

If one of defendant's employees dropped the pencil, it is clear that the defendant can be held liable for

their conduct, even without proof of the length of time which the pencil had been on the floor. Two extensive annotations on the subject of debris on the floor and obstacles on the floor appear at 61 A.L.R. 2d 6 and 110, collecting some of the thousands of cases that have discussed these issues. At pp. 24 and 124, this rule is stated, and cases cited in support thereof.

> "Thus, it has been said that matters as to notice, including questions as to the length of time the dangerous condition existed are eliminated where it appears that the condition was created by defendant or persons for whose conduct he is responsible."[1]

The same rule is, of course, followed in Oregon. When the condition of the floor of the premises is the result of the act of defendant or its agents and employees, knowledge of the condition is automatically imputed to the defendant. See *Saunders* v. *Williams & Co.*, 155 Or. 1, 11, 62 P.2d 620 (1936); *Hesse* v. *Mittleman,* 145 Or. 421, 423, 27 P.2d 1022 (1934).

The latest expression of the Supreme Court of Oregon on this subject is in *Miller* v. *Safeway Stores,* 219 Or. 139, 153, 312 P.2d 577, 346 P.2d 647 (1959), wherein the court stated:

> "In this case we are not called upon to decide if defendant had knowledge that the boxes were in the aisle. The defendant admits that the boxes were

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[1] Among the cases cited is *Vogue, Inc.* v. *Cox,* 28 Tenn. App. 344, 190 S.W. 2d 307 (1945), in which plaintiff stepped on a pencil lying near a counter, and fell. A saleslady immediately picked it up and said, that is my pencil, and stuck the pencil in her hair.

In the instant case, the manager ordered the pencil picked up, and, when it was handed to him, put it in his pocket with a group of pencils.

placed there by defendant's employees and that they contained merchandise of the defendant, probably soap, to be placed upon the shelves. This imputes knowledge."

Finally, Mr. Steinsiek testified that his own pencil, Exhibit 6E, which was similar to the type of pencil described by plaintiff and his sister, was not a common type of pencil, and was the same type used for making the banners that Safeway uses in its stores, which were made by an employee right in the Tillamook store (R. 46-47). This evidence would be sufficient to take to the jury the issue of whether or not the pencil was a Safeway pencil, and hence presumably dropped by a Safeway employee. See discussion in *Eitel* v. *Times,* 221 Or. 585, 597-598, 352 P.2d 485 (1960).

Thus, in this case, we have evidence of the nature of the pencil and of the conduct of the Safeway employees with respect to it immediately after the accident tending to prove that the pencil was dropped by a Safeway employee, coupled with the fact that Safeway employees were the only ones in the store or who had been in the store up until the time that plaintiff fell. The irresistible conclusion from plaintiff's testimony is that if the pencil was there only a short time, it was dropped by a Safeway employee. Knowledge was therefore imputed to the defendant.

The only other alternative from the evidence was that the pencil had been there since before the store opened that morning. If the pencil had been there the night before, it would seem clear, even under the very Oregon case relied upon by the defendant in its motion for

non-suit, that there was sufficient evidence of constructive notice to go to the jury. In *Cowden* v. *Earley,* 214 Or. 384, 387, 327 P.2d 1109 (1958) the traditional Oregon rule is stated as follows:

> "The rule of law applying to a case of this kind is well established. An invitee who is injured by slipping on a foreign substance on the floor or stairs of business property must, in order to recover from the occupant having control of said property, show either:
>
> (a) That the substance was placed there by the occupant,or
>
> (b) That the occupant knew that the substance was there and failed to use reasonable diligence to remove it, or
>
> (c) That the foreign substance had been there for such a length of time that the occupant should, by the exercise of reasonable diligence, have discovered and removed it."

If the pencil had been in that place since the night before, the conditions of paragraph (c) above have certainly been met. A store owner, in the exercise of reasonable diligence, should be able to find a foreign object on his floor in that time. And, as above demonstrated, if the object had not been on the floor since the night before, the case must necessarily come within the requirements of paragraph (a) or paragraph (b), because the pencil must necessarily have been dropped by a Safeway employee.

We presume that defendant will concede that a large round pencil on the floor of the store is an object which is a danger to customers. See the case of *Vogue, Inc.* v. *Cox,* supra, p. 9, n. 1; compare, *Lucas* v. *City of*

Juneau, 168 F. Supp. 195 (D.C. Alas., 1958) in which the court held that there was no evidence that defendant was responsible for the presence of a pencil on the floor, but stated:

> "* * * There could be little doubt that its presence as such on the floor of the store would tend to create a hazard as to the customers."

In summary then, plaintiff submits that his evidence clearly establishes that the case must fall into one of two alternatives: Either the pencil had been there long enough for defendant's employees, in the exercise of reasonable care, to have found it and removed it, or, if it had not been there long enough, it could only be because it had been dropped by one of defendant's employees. In either case, a jury question was presented with respect to defendant's negligence.

C. Whether plaintiff was guilty of contributory negligence was for the jury.

It is a little difficult to determine, from the comments of the trial court, exactly what the basis of the court's ruling is. At one point he expressed himself as being interested in "who caused the creation." (R. 59). At another point, he indicated that the plaintiff had the same responsibility with respect to using due care that the defendant did and that since he hadn't seen the pencil, there was no reason for the Safeway people to have seen it (R. 60). Finally, he indicated that the issue of causation was such that "I have never seen a plainer case that was more speculative in the causation of the accident than this case." (R. 61). Although the law on

the subject seems to be perfectly clear, discussion of contributory negligence is in order, since contributory negligence as a matter of law was a ground of the defendant's motion, and in view of the trial court's remarks.

Plaintiff's testimony was (R. 18):

> "A. Well, I was—I just—Well, like I was goin' up the aisle lookin' for supplies and I just slipped and fell."

In numerous cases, the Oregon Supreme Court has held that evidence similar to this raises a jury question on the issue of contributory negligence. In fact, so far as plaintiff is aware, the Oregon Supreme Court has never held that a customer in a store was guilty of negligence as a matter of law in slipping on a foreign substance.

In *Miller* v. *Safeway Stores,* supra, 219 Or. at pp. 257-258, plaintiff testified, "I was just looking where I was going and I was looking at the shelves and shopping just like anyone else does in these stores." The Court held that it was for the jury to decide whether she was giving adequate attention, under the circumstances, to her feet. In *Lopp* v. *First National Bank,* 151 Or. 634, 639, 51 P.2d 261 (1935), the Court stated:

> "The patrons of the business having occasion to enter the building have a right to assume that this duty [to keep the floor ordinarily safe to walk upon] has been complied with or discharged, notwithstanding that the condition of the floor could have been seen if the patron 'exercised a reasonable alertness'."

In that case, plaintiff's testimony had been that she "glanced at the floor and then glanced up to find a desk." A judgment of non-suit was reversed.

In a similar situation, in *Hovedsgaard* v. *Grand Rapids Store,* 138 Or. 39, 53-54, 5 P.2d 86 (1931), plaintiff was an employee who slipped on a grease spot on a stairway. When asked whether he had looked at the stairway to see what the conditions were, he stated, "I just went up, that is all." He admitted that had he looked he might have seen the grease spot. The Court held:

> "It cannot be said that as a matter of law the plaintiff was negligent in not looking at each step of the stairway in question. The question is one for the jury. In the absence of notice to the contrary, the plaintiff had a right to assume that the stairway provided for his use in going to his work, and that of the other workmen in going to theirs, would be reasonably safe."

Most recently, in *Shepard* v. *Kienow's,* 70 Or. Adv. Sh. 1073, 71 Or. Adv. Sh. 451, 351 P.2d 700, 356 P.2d 147 (1960), opinion on rehearing, the Court held:

> "In our former opinion it was said that the plaintiff's failure to look at the floor upon entering the store constituted contributory negligence. Proof that plaintiff failed to look at the floor does not establish that she was negligent as a matter of law. Whether plaintiff's failure to examine the floor constituted contributory negligence was a matter for the jury."

In his remarks in ruling upon the motion for nonsuit, the Court indicated that since plaintiff and his sister had not seen the pencil, there was no reason to

expect that the defendant could have seen the pencil either. This statement ignores two basic propositions. In the first place, the defendant had hours in which to find the pencil, whereas plaintiff and his sister were simply walking down the aisle. In the second place, defendant had a duty to keep the store reasonably safe for its customers, which included a duty to inspect the aisles to determine whether their condition was safe. Planitiff had no duty to inspect the aisles; he was merely required to walk with reasonable care, and whether he did so was a question for the jury. The case of *Miller* v. *Safeway Stores,* supra, contains a discussion of the use of "attention arresters" and various other merchandising devices in self-service stores, which is relevant to this issue. It would be disastrous to defendant's business if all its customers spent their time in the store looking at their feet instead of at the displays used for the purpose of inducing customers to purchase. In that case, the Court also referred to the duty of the defendant to warn, stating:

> "If she should have been alerted to the probability of an obstacle at the spot where she could anticipate moving to or standing in when reaching the shelf was for the jury to decide."

Contributory negligence, therefore, like negligence, was for the jury to determine.

D. In diversity cases, what constitutes a jury question is governed by federal law.

What has gone before has largely been presented as if predicated upon the assumption that Oregon law governed the question of whether a sufficient case was made

out for jury decision. The Oregon Court itself, however, has noted that the standard applied by it for determining sufficiency of the evidence to go to the jury is not as favorable to the plaintiff as is applied in the federal courts, specifically citing *Lavender* v. *Kurn,* 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1945) as setting a more liberal standard than is applied in Oregon. *Eitel* v. *Times, Inc.,* 221 Or. 585, 593, 352 P.2d 485 (1960). As has been demonstrated, even under the more stringent Oregon standard, a jury case was made out. It is clear, however, that even in diversity cases, the applicable standard is the federal standard. *Smith* v. *Buck,* 245 F.2d 348, 349 (C.A. 9, 1957); *Allen* v. *Matson Navigation Company,* 255 F.2d 273, 281-282 (C.A. 9, 1958). Although the rule is not followed in all the circuits, the carefully reasoned and well supported dissent of Judge Pope in *Trivette* v. *New York Life Ins. Co.,* 283 F.2d 441, 443 (C.A. 6, 1960) estabishes that not only the Ninth Circuit, but the great weight of federal authority adheres to the rule that the Seventh Amendment to the United States Consitution governs this issue.

CONCLUSION

Plaintiff submits that under the evidence presented to the trial court, he was entitled to the trial by jury guaranteed to him by the Constitution of the United States and the Federal Rules of Civil Procedure. The judgment of the court below should be reversed, and the cause remanded in order that plaintiff may have his case submitted to the jury for decision.

Respectfully submitted,

POZZI, LEVIN & WILSON,
PHILIP A. LEVIN,

Attorneys for Appellant
Marvin Fannan.

No. 17315

United States
Court of Appeals
for the Ninth Circuit

SAFEWAY STORES, INCORPORATED,

Appellant,

vs.

MARVIN FANNAN,

Appellee,

and

MARVIN FANNAN,

Appellant,

vs.

SAFEWAY STORES, INCORPORATED,

Appellee.

Transcript of Record

Appeals from the United States District Court for the District of Oregon.

Phillips & Van Orden Co., 4th & Berry, S. F., Calif.—Rec. 5/18/61—Printed 6/19/61

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

TOOZE, KERR, TOOZE & MORRELL;
LAMAR TOOZE;
EDWIN J. PETERSON,
811 Equitable Building,
Portland 4, Oregon,

For Appellant-Appellee Safeway Stores, Inc.

POZZI, LEVIN & WILSON;
PHILIP LEVIN,
Cascade Building,
Portland 4, Oregon,

For Appellee-Appellant Marvin Fannan.

United States District Court
For the District of Oregon

Civil No. 60-170

MARVIN FANNAN, Misnamed in Plaintiff's Complaint as MARVIN FANNON,

Plaintiff,

vs.

SAFEWAY STORES, INCORPORATED, a Corporation,

Defendant.

PRETRIAL ORDER

This matter having come on regularly for pretrial before the undersigned Judge of the above-entitled Court, plaintiff appearing by Pozzi & Wilson, his attorneys; defendant appearing by Tooze, Kerr, Tooze & Morrell, its attorneys, and this pretrial order was made.

Admitted Facts

I.

That this action is one of a civil nature wherein the matter in controversy exceeds the sum of $10,000 exclusive of interest and costs; that said matter in controversy is between citizens of different states, that is, between the plaintiff who at the time of the commencement of this action was and still is a resident and citizen of the State of Oregon, and the defendant, Safeway Stores, Incorporated,

which at the time of the commencement of this action was and still is a corporation organized and existing under the laws of the State of Maryland with its principal place of business in the State of California and in no other state, and which was and is a resident and citizen of the State of Maryland. That this Court has jurisdiction of this action, of the subject matter thereof, and of said parties.

II.

That during all times mentioned herein the defendant was and is duly licensed to do, and was and is doing, business in the State of Oregon and at all of said times owned and maintained a store in the City of Tillamook, State of Oregon.

III.

That plaintiff has filed timely request for trial by jury and is entitled to jury trial herein.

IV.

That on or about November 30, 1959, plaintiff was a business invitee in defendant's store in the City of Tillamook, State of Oregon, and at that time fell to the floor thereof.

Plaintiff's Contentions

Plaintiff contends and the defendant denies as follows:

I.

That on or about November 30, 1959, this plaintiff, as a business invitee at the defendant's store

in the City of Tillamook, State of Oregon, was caused to slip and fall because of a marking pencil on the floor and was caused severe injuries as hereinafter alleged.

II.

That at the time and place of the occurrence above mentioned, the defendant corporation, its officers, agents and employees, were negligent, careless and reckless in one or more of the following particulars:

1. In allowing and permitting said marking pencil to remain in the aisleway of said store.

2. In depositing the said marking pencil on said floor.

III.

That as a proximate result of said negligence of the above-named defendant, this plaintiff was caused to slip on said marking pencil and fall, causing him severe nervous shock, physical and mental pain and suffering, a tearing, twisting, and wrenching of the muscles, tendons, ligaments, bones, nerves and soft tissues of his left knee, an aggravation of a pre-existing knee condition, from all of which the plaintiff has been rendered sick, sore, nervous and distressed and has been required to undergo an operation and has sustained permanent injuries and all to his damage in the full sum of $50,000.00.

IV.

That as a proximate result of said negligence of the above-named defendant corporation, this plaintiff has lost income and wages to date in the ap-

proximate sum of $1500.00 and will lose further income and wages, and has incurred doctor, hospital and medical expenses to date in the approximate sum of $646.10, and will incur further medical expenses.

V.

That at the time of the happening of said occurrence, this plaintiff was a healthy, robust, able-bodied man of the age of 28 years and capable of engaging in strenuous physical labors with a life expectancy under the standard mortality tables of 39.49 years; that plaintiff's ability to work and perform strenuous physical activities has been permanently impaired and he will continue to have pain and suffering as a proximate result of the negligence of the defendant corporation.

Defendant's Contentions

Defendant contends and the plaintiff denies that if, as plaintiff contends, the plaintiff was injured in said fall, the said fall and said injuries were proximately caused by the negligence and carelessness of the plaintiff himself in that at and immediately prior to the time of plaintiff's said fall he failed and neglected to keep a proper lookout as to the physical conditions then and there existing.

Issues

The issues in this case are raised by the contentions of the parties and the denials thereof.

Physical Exhibits

Certain physical exhibits have been identified and received as pretrial exhibits, the parties agreeing with the approval of the Court that no further identification of these exhibits is necessary. In the event that the exhibits, or any of them, should be offered as evidence at the time of trial, said exhibits are to be subject to objection only upon the grounds of relevancy, competency and materiality.

Plaintiff's Exhibits

1. X-rays of plaintiff (A to ..).
2. Deposition of Raymond Strawn.
3. Deposition of Walt Steinsiek.
4. Hospital records—St. Vincent's Hospital.
5. Hospital records—Providence Hospital.
6. Reserved.
7. Model of left leg.

Defendant's Exhibits

10. X-rays of plaintiff (A to D).
11. Pencil.
12. Deposition of plaintiff.
13. Reserved.
14. Reserved.
15. Reserved.

Expert Testimony

Each of the parties hereto reserves the right to call experts as witnesses to give opinion evidence

upon the matters upon which expert opinion can be given on the issues made by the contentions of the parties and the denials thereof.

The foregoing constitutes the pretrial order in this matter and supersedes the pleadings in this matter and shall not be amended hereafter except by the consent of the parties or to prevent manifest injustice.

Dated this 14th day of November, 1960.

/s/ WILLIAM G. EAST,
United States District Judge.

Approved as to Form:

/s/ DONALD R. WILSON,
Of Attorneys for Plaintiff.

/s/ LAMAR TOOZE,
Of Attorneys for Defendant.

Lodged November 10, 1960.

[Endorsed]: Filed November 14, 1960.

United States District Court
for the District of Oregon

Civil No. 60-170

MARVIN FANNAN, Misnamed in Plaintiff's Complaint as MARVIN FANNON,

Plaintiff,

vs.

SAFEWAY STORES, INCORPORATED,

Defendant.

JUDGMENT OF DISMISSAL

This cause came on regularly for trial in the above-entitled court before the undersigned judge of said court on the 14th day of November, 1960, plaintiff appearing in person and by Donald R. Wilson, one of his attorneys, and the defendant appearing by Lamar Tooze, one of its attorneys; a jury was duly empaneled and sworn to try the cause; counsel for the respective parties made opening statements to the jury; evidence was adduced by the plaintiff and after the plaintiff had rested his case the defendant moved the court for an order directing the jury to return a verdict in favor of the defendant for the reasons and on the grounds stated in said motion; respective counsel argued said motion and the court after hearing the same, after being fully advised in the premises and treating said motion for a directed verdict as a motion for a judgment of dismissal, concluded that said motion was well taken,

Now, Therefore, it is hereby Ordered and Adjudged that said motion be and the same is hereby granted and that the above-entitled action be and the same is hereby Dismissed and that defendant have and recover of and from the plaintiff its costs and disbursements incurred herein taxed in the sum of $169.00, without prejudice.

Dated this 14th day of November, 1960.

/s/ WILLIAM G. EAST,
United States District Judge.

[Endorsed]: Filed November 16, 1960.

[Title of District Court and Cause.]

MOTION TO AMEND JUDGMENT

Comes now the defendant and moves the Court for an order amending the judgment of dismissal made, dated and entered herein on the 14th day of November, 1960, and filed in the office of the clerk of the above-entitled Court on November 16, 1960, by deleting therefrom the words "without prejudice" at the end of the body thereof for the reasons and on the grounds that the inclusion of said words "without prejudice" is prejudicial to the defendant and is without authority in law, the judgment having been entered following the action of the Court sustaining the specific grounds of the motion of the defendant for an order directing the jury to return

a verdict in favor of the defendant made at the close of the evidence offered by the plaintiff which specific grounds showed, as a matter of law, that the evidence adduced by the plaintiff was insufficient to support a verdict in his favor.

Respectfully submitted,

/s/ LAMAR TOOZE,
Of Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Entered]: Filed November 18, 1960.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now plaintiff, by and through his attorneys, and respectfully moves the Court based upon the provisions of Rule 59 of the Federal Rules of Civil Procedure to award him a new trial of the above-entitled case upon the ground and for the reason that the Court erred in granting defendant's motion for an order of involuntary non-suit in the above-entitled case.

Respectfully submitted,

POZZI, LEVIN & WILSON,

/s/ PHILIP A. LEVIN,
Attorneys for Plaintiff.

In presenting the foregoing motion, plaintiff will rely upon the cases of Miller v. Safeway Stores, 69 Or. Adv. Sh. 747; Eitel v. Times, Inc., 70 Or. Adv. Sh. 1129; and Shepard v. Kienow's Food Stores, 71 Or. Adv. Sh. 451 (Opinion on Rehearing).

/s/ PHILIP A. LEVIN,
Of Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 22, 1960.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION TO AMEND JUDGMENT

On motion of the defendant under Rule 59 (e), Federal Rules of Civil Procedure, to amend the judgment of dismissal made, dated and entered herein on the 14th day of November, 1960, and filed in the office of the Clerk of this Court on November 16, 1960, by deleting therefrom the words "without prejudice" at the end of the body thereof, plaintiff appearing by Philip A. Levin, one of his attorneys, and defendant appearing by Lamar Tooze, one of its attorneys, and the Court after hearing argument in support of the same and being fully advised in the premises,

It Is Hereby Ordered that said motion to amend said judgment be and the same is hereby Denied.

Dated this 28th day of November, 1960.

/s/ WILLIAM G. EAST,
United States District Judge.

Presented by:

/s/ EDWIN J. PETERSON.

[Endorsed]: Filed November 28, 1960.

[Title of District Court and Cause.]

ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL

On motion of the plaintiff under Rule 59 of the Federal Rules of Civil Procedure, to award him a new trial of the above-entitled action, plaintiff appearing by Philip A. Levin, one of his attorneys, and the defendant appearing by Lamar Tooze, one of its attorneys, and the Court having considered plaintiff's memorandum in support of the same and being fully advised in the premises,

It Is Hereby Ordered that said motion for a new trial be and the same is hereby Denied.

Dated this 28th day of November, 1960.

/s/ WILLIAM G. EAST,
United States District Judge.

Presented by:

/s/ EDWIN J. PETERSON.

[Endorsed]: Filed November 28, 1960.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Safeway Stores, Incorporated, a corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from such part only of the judgment of dismissal entered in this action on the 14th day of November, 1960, as dismissed this action without prejudice and also from the order denying defendant's motion to amend the said judgment of dismissal entered herein on November 28, 1960.

/s/ LAMAR TOOZE,

/s/ EDWIN J. PETERSON,

TOOZE, KERR, TOOZE & MORRELL,
Attorneys for Appellant.

[Endorsed]: Filed December 28, 1960.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Safeway Stores, Incorporated, and Tooze, Kerr, Tooze & Morrell, its attorneys:

You and Each of You are hereby given notice that Marvin Fannan, plaintiff above named, hereby

appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of dismissal made and entered in the above cause on the 14th day of November, 1960.

POZZI, LEVIN & WILSON,

/s/ PHILIP A. LEVIN,
Attorneys for Plaintiff-Appellant.

[Endorsed]: Filed December 28, 1960.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Before: Honorable William G. East,
U. S. District Judge.

November 14, 1960

Appearances:

MR. DONALD R. WILSON,
Of Attorneys Representing Plaintiff.

MR. LAMAR TOOZE,
Of Attorneys Representing Defendant.

* * *

MARVIN ANTHONY FANNAN

produced as a witness in his own behalf, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

By Mr. Wilson:

Q. Would you tell us your full name so we can all hear, please?

A. Marvin Anthony Fannan.

Q. And when and where were you born?

A. Milton-Freewater, Oregon; March 2nd, 1931.

Q. That makes you 29 at the present time?

A. Yes, sir. [19*]

* * *

Q. Now, do you remember what day of the week it was your accident happened, Mr. Fannan?

A. It was on a Monday.

Q. This was a Safeway store?

A. Yes, sir.

Q. What city was that located in?

A. Tillamook, Oregon, sir.

Q. Where were you living at that time?

A. I was livin' at Netarts.

Q. Did you have any relatives live in the area?

A. Yes, sir.

Q. Had you lived in that area before? [25]

A. Well, in the Tillamook area.

Q. Had you been in the Safeway store prior to this November 30th date?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Marvin Anthony Fannan.)

A. I prob—I think I had once or twice, maybe.

Q. Would you tell us how you got to the store this particular morning?

A. Yes. We drove from Netarts to the store.

Q. Who is we?

A. Well, it's my sister, my wife, my brother-in-law, and the two children.

Q. Who went in the store?

A. My sister and myself.

Q. What did the rest of them do?

A. Well, they was waitin' in the car.

Q. What was the specific reason for your going to Safeway?

A. Well, it was—I was lookin' at a truck across —right across from Safeway's, and we was gonna go on over and take a look at the truck.

I was just makin' up my mind between that truck and one up here in Hillsboro. We was gonna look the truck over briefly and then go on into the store when it opened.

Q. Did your sister go across the street with you?

A. No, she did not.

Q. What did she do?

A. She waitin' in the car. She was gonna holler at us when [26] the store opened.

Q. Did you see the store being opened?

A. I—I—I never seen it, my sister called me.

Q. Did you go into the store with her?

A. Yes, sir.

Q. Would you tell us where you went as you got in the store? A. As I went in the store?

(Testimony of Marvin Anthony Fannan.)

Q. Yes.

A. Well, I went back to pick up some, oh, supplies—sugar, coffee, and so forth. We went—oh, just went around and went through the aisle. My sister went on back to the—to the meat counter to pick up the scraps, oh, for crab nets. Well, that's where I went.

Q. You mean you both walked down the same aisle? A. Yes, sir.

Q. Where were you headed at the time you were walking down the aisle toward the rear of the store or to the side——

A. I was headin' down the aisle toward the rear of the store.

Q. Would you tell us then what happened?

A. Well, I was—I just—well, like I was goin' up the aisle lookin' for supplies and I just slipped and fell.

Q. How did you fall?

A. I fell on my—on my knees and hands.

Q. Was your—how was your left leg, what position was it in?

A. Well, it was under me. I fell on my left leg. [27]

Q. Do you know what side of the aisle you were on as you fell?

A. Yes. I was on the—I was on the—I was on the right-hand side.

Q. Do you know approximately how wide the aisle is, to the best of your recollection?

A. I'd think somewheres—six, seven feet.

(Testimony of Marvin Anthony Fannan.)

Q. Now, did you notice what caused you to fall then as you were there?

A. Yes, sir. Just a little bit after I fell I looked back and there was a pencil spinning back down the aisle. Just——

Q. Where? Excuse me.

A. It was just spinning like a top down the aisle.

Q. Where was it located in reference to you?

A. It was behind me about, oh, ten or fifteen feet.

Q. When you say it was spinning you mean like it was laying on a flat surface twirling?

A. Yes, sir.

Q. What did you do then? Were you able to get up by yourself? What happened?

A. No, sir. I hurt so bad I didn't do nothin', I just set there.

Q. Who was the first one to you?

A. Well, the first one to me was my sister.

Q. Yes.

A. And then she—she got excited and run back to the back and [28] got a fella from the meat department. Then he came—he came and asked me a couple questions. In turn he got the manager of Safeway Store.

Q. Well, did you need any assistance in getting up? A. Yes, sir.

Q. Who helped you?

A. The manager helped me up.

Q. Where did you go after you were helped up?

(Testimony of Marvin Anthony Fannan.)

A. Well, he took me to the back of the store.

Q. By the back of the store, do you mean out of the place for the customers to walk?

A. Yes, sir; back in the back with the supplies and stuff.

Q. Some boxes? A. Yes, sir.

Q. What did you do, sit back——

A. Yes, sir, I sit down on a box back there.

Q. Now, did you see this pencil any time after you saw it spinning behind you?

A. Only other time I seen it was when the meat man picked it up and he gave it to the manager of the store.

Q. When did you see the manager have it?

A. Well, when I seen it was when he was puttin' it in his pocket. He slipped it in his pocket.

Q. Could you tell what kind of a pencil it was as he was putting it in his pocket? [29]

A. Well, the pencil that I seen was black—black, shiny pencil.

Q. Did you know whether it was—did you actually see a pencil or did you see a group of pencils?

A. Well, he put it in with some other pencils. It was just a round, pretty heavy pencil with a little screw apparatus on top, the one I seen.

Q. All right. Then after you were back in the store a little while in the back end, what did you do? Were you able to walk out?

A. No, sir. I asked—well, he was—he wanted me to go back and set down there a little bit. Then I wanted to go to the doctor. Then after a while he

(Testimony of Marvin Anthony Fannan.)

helped me out to the door. I called my brother-in-law and he helped me to the car, my [30] brother-in-law.

* * *

Q. When you went in the store—the Tillamook store, did you see any other people there other than Safeway employees?

A. No, sir. We was the first ones that went in.

Q. During the time that you were in the store and when you went out, did you see any other people other than Safeway employees?

A. No, sir. We went out through the back door out of the produce—out of this—where they had this stuff stored.

Q. Who did you see with regards to the Safeway personnel during the time that you were in the store, and the time that you left?

A. I seen the fellow from the meat counter—from the meat place back there and the store manager.

Q. Did you see anybody in the back room?

A. Oh, just workin' back there. There was a couple people back there just workin'. I think they was unloadin' a truck or [40] somethin', if I remember right. [41]

* * *

Cross-Examination

By Mr. Tooze:

* * *

(Testimony of Marvin Anthony Fannan.)

Q. When you were in your father's store, what kind of pencil did he use for marking?

A. Well, he used all types of pencils.

Q. Did he ever use a grease pencil so-called?

A. Yes, sir; he did.

Q. It was a regular grease pencil with a screw top, was it? A. Yes, sir.

Q. And they use it for marking [55] merchandise? A. Yes, sir.

Q. Your father used that? A. Yes, sir.

Q. Did you ever use one?

A. Yes, sir; I have. [56]

* * *

Q. Now, as I understand it the only Safeway people that you saw there at the time of the accident were the manager, Mr. Strawn, and the man who was in charge of the meat market; is that right? A. Mr. Strawn? Who is Mr. Strawn?

Q. That's this gentleman here (indicating).

A. Him and the fellow that was in the meat—that came back from the meat counter was the only ones that I came and talked—came in contact and talked to.

Q. Now, where was this pencil located that you say you saw? Which side of the aisle was it on as you were proceeding down the aisle?

A. Well, it must have been—it must have been on the right side, because that's where I fell.

Q. On the right side? A. Yes. [81]

(Testimony of Marvin Anthony Fannan.)

Q. How far away was it from the counter or the display shelves?

A. I can't—I don't—I don't know. I stepped on it. I don't know.

Q. I see. Now, did you step on it full weight?

A. I imagine, yes.

Q. How much do you weigh?

A. 225 pounds.

Q. How tall are you? A. Six foot one.

Q. Was that your weight at the time of this accident? A. Approximately so.

Q. What kind of shoes were you wearing?

A. Just a pair of shoes. Just ordinary shoes.

Q. Were they heavy shoes, work shoes?

A. I don't remember exactly.

Q. Did your stepping on the pencil crush the pencil? A. No.

Q. Was it damaged at all so far as you could tell?

A. I never—I never examined the pencil to see that it was crushed, or anything, but I don't think so.

Q. Did you feel anything crushing under your foot?

A. I felt it roll under my foot, not crush.

Q. Yes. Now, what part of your foot hit the pencil? A. The ball of my foot.

Q. Which foot was it? [82]

A. I slipped from—with my left foot. That was my——

(Testimony of Marvin Anthony Fannan.)

Q. That is, you struck it with your left foot on the ball of your foot?

A. I'm not sure, but I think I did.

Q. You had your whole weight on it, did you?

A. I was walking.

Q. Well, did you have your whole weight on your foot when you slipped and fell?

A. I imagine, yes.

Q. Well, we want to—if you don't know, say so, but if you do remember, say so, Mr. Fannan.

A. Well, I am normally walking. I don't know what weight I had on——

Q. But you did hit it with the ball of your foot?

A. With the ball of my foot.

Q. Did you weigh 225 jounds?

A. Yes, sir; approximately that.

Q. Did you have any injuries other than the injury to your knee?

A. You mean anywhere?

Q. Yes. A. Not that I know of.

Q. You didn't have any skinned elbow, or anything like that?

A. Oh, I have skinned my elbows.

Q. No. No. I mean at the time of this [83] accident. A. No.

Q. So, all of the injuries that you sustained were due to the injury to your knee?

A. Yes; I believe so.

Q. Now, when you fell did you actually strike your knee on the floor? A. Yes, sir.

Q. How did you fall? Just tell the jury.

(Testimony of Marvin Anthony Fannan.)

A. Well, I just—I just was—I was in the air, I reached for the—I reached for the counter where the stuff was—the stand where the stuff was there and I missed it and I just caught—I caught myself when my knees hit and then I went from my knees down to my hands.

Q. Now, when you stepped on this pencil and the—the pencil went forward or backwards?

A. It went backwards.

Q. Then how did you fall, forward or backwards? A. I fell forward.

Q. You fell like this (demonstrating)?

A. (Witness nods head.)

Q. On your hands and knees? A. Yeah.

Q. Did you break your fall with your hands?

A. Well, my hands was on the floor when I ended up. It all happened so quick I don't know how—exactly how I hit. [84]

Q. Now, where was your sister at the time you fell?

A. She was in front of me going toward the meat counter.

Q. How far in front of you?

A. I don't know exactly. 15, 20 feet, I imagine.

Q. She was bound for the meat counter which was down at the rear end of the store beyond this aisle that you were using; is that right?

A. Yes, sir.

Q. Do you wear glasses? A. No, sir.

Q. Is your eyesight good? A. Yes, sir.

(Testimony of Marvin Anthony Fannan.)

Q. And the lighting conditions were good there, were they not? A. Yes, sir. [85]

* * *

WANDA PERRIGO

produced as a witness in behalf of the plaintiff, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

By Mr. Wilson:

Q. Mrs. Perrigo, what relation are you to Marvin Fannan? A. He is my brother.

Q. Where do you presently live?

A. I live at Waldport, Oregon.

Q. Back in November 30th, 1959 where did you live? A. I lived at Netarts, Oregon.

Q. Now, were you in the Safeway store with your brother on November 30th?

A. Yes, sir.

Q. How did you people get to the store?

A. We took the car.

Q. And who went in the store?

A. My brother and myself.

Q. Would you tell us what route you took and what route your brother took as you entered the store?

A. Well, we just went in the door and went through the turnstile and then turned back where the aisleway and the counters—we started up one

(Testimony of Wanda Perrigo.)

of the aisles toward the meat market where I was going because I had been told to get some beef bones there for crab bait. [86]

Q. Now, as you were walking you were walking to the back of the store down an aisle?

A. Unh-hunh.

Q. Where was Marvin in relation to you as you were walking down that aisle?

A. Well, he had stopped—stopped to look for something—coffee, I believe—and I kept on going toward the meat market. And he started up again.

But just as I got to the end of the aisle I turned to tell him to get some cookies.

Mr. Tooze: Would you speak a little louder? I can't——

The Witness: Yes, sir. I told him to get some cookies. We were going to have kind of a—well, a lunch with our crab. Just as I looked around to tell him to get the cookies I seen him in midair. I run back to see what had happened and he was—by the time I got there, of course, he was down on the floor.

Q. (By Mr. Wilson): What condition did he appear to be in when you saw him on the floor?

A. Oh, his face was real white and he was—his leg was more or less crumpled underneath him, it was turned sideways.

Q. Which leg was that?

A. The left leg (indicating).

Q. Now, when you people entered the store was the door unlocked or were you standing there wait-

(Testimony of Wanda Perrigo.)

ing for it to be unlocked, or what were the circumstances? [87]

A. My brother and my husband went across the road. The door hadn't been unlocked yet. They went across the road to look at an old truck that they were going to get and make it work. My sister-in-law and I were sitting in the car waiting for them to get done with their car shopping and wait for the store to open. When it opened, why, I hollered and said that the store was open, "Come on." So——

Q. Do you know whether or not you were one of the first ones to enter the store—patrons?

A. Yes, sir; we were the first ones to enter the store.

Q. Did you see any other patrons in the store after you had entered it until the time you left?

A. No, sir; I didn't see any other patrons in the store at all.

Q. Were you carrying any kind of a pencil with you as you went into the store? A. No, sir.

Q. Now, where were you when you said that you saw Marvin fall or in the air?

A. I was almost to the end of the aisleway, almost to the meat counter.

Q. Had you walked by the same area where he was on the floor when you turned around?

A. Yes, sir.

Q. What did you do then when you went back to your brother?

A. Well, I tried to help him up, and I couldn't,

(Testimony of Wanda Perrigo.)

so I run back [88] to the meat counter and I asked the butcher there, I said, "Come and help me with my brother. He has fall—fell down." And he came around and he looked at my brother and then he went to get the manager of Safeway and——

Q. Did anyone help your brother up?

A. Yes; Mr. Strawn helped him up.

Q. Then what did they do, your brother and Mr. Strawn?

A. Mr. Strawn helped my brother to the back end of the Safeway to where they bring in their produce and things.

Q. Did you see any other store employees or notice them other than the man at the meat counter and Mr. Strawn, the manager?

A. There was one other one in the back room bringing in boxes. I'm almost positive of that, but not completely.

Q. What happened then after you people left the back room? How did you get out?

A. Mr. Strawn opened up the freight doorway and he helped my brother over to the doorway and I got my husband to come and help with him in the car. We put him in the car and took him to the doctor. [89]

* * *

Q. Now, did you happen to see the object which your brother rolled on?

A. I seen the object while it was still spinning. Mr. Strawn told the meat man, I'm sure that—to go pick it up, somebody had already been hurt on it.

(Testimony of Wanda Perrigo.)

Then I never seen it again until we got in the back. [90]

Mr. Tooze: What did you say? I can't quite hear.

The Witness: I beg your pardon.

Mr. Tooze: I can't quite hear.

The Witness: I say I seen the object while it was still spinning. When Mr. Strawn helped my brother up he told the meat man—he looked over and seen this pencil and he told the meat man, he said, "Go pick that up. One man's already been hurt."

Then he helped my brother into the back room and the meat man brought in the pencil and Mr.—give it to Mr. Strawn. He put it in his shirt pocket or apron pocket.

Q. (By Mr. Wilson): Did you have a chance to see what kind of a pencil it was at that time?

A. It was black and shiny and it was—didn't look like it had any other color on it. It was just, oh, five or six inches long, I guess, or something like that. Black-like, kind of slick looking like plastic.

Mr. Wilson: You may inquire.

Cross-Examination

By Mr. Tooze:

Q. Mrs. Perrigo, your eyesight is good?

A. Yes, sir.

Q. At the time of this accident were you required to wear glasses? A. No, sir.

(Testimony of Wanda Perrigo.)

Q. The lighting conditions at the place where your brother [91] fell were all right, weren't they?

A. Yes.

Q. When you were moving down the aisle going toward the meat counter you weren't looking for any merchandise to purchase on any of the counters which were on that aisle, were you?

A. No, sir.

Q. You were going to make your purchase at the meat market? A. Unh-hunh.

Q. Did you see this pencil?

A. No, sir; I didn't.

Q. Now, this pencil that you have mentioned. you say it was about five or six inches long?

A. Yes, sir.

Q. How close were you to it when—after the accident so you could see it?

A. Well, as close, really, as I was to it was when I saw the—when the man at the meat counter picked it up.

Q. Then were you there when that pencil was delivered by the man from the meat counter to Mr. Strawn? A. Yes, sir.

Q. Did you get a close look at it?

A. I never got an absolute perfect look at it, but it did—it had—he clipped it in his apron pocket, that's all.

Q. Now, as a matter of fact, wasn't it a little pencil—a little short pencil about three and a half inches long with a [92] wooden—a wooden pencil with a rather heavy, black lead in it? Wasn't that

(Testimony of Wanda Perrigo.)

the pencil that you saw? A. No, sir.

Q. Had you ever traded at the store before?

A. Yes. We have been in there three or four times. Not too long.

Q. I mean prior to this accident.

A. Unh-hunh. [93]

* * *

Mr. Wilson: Fine, your Honor. At this time, your Honor, I'd like to read the deposition of Walter R. Steinseik. The deposition was taken to perpetuate testimony Saturday morning.

* * *

Mr. Tooze: If your Honor please, I would like to state for the information of the Court and the jury that at the taking of this deposition the defendant Safeway Stores was represented by Mr. Edwin Peterson, one of our lawyers in our office. Therefore, it was he who will be asking questions. And I——

The Court: Rather than yourself?

Mr. Tooze: ——that I will be reading.

(At this point the Court Clerk took the witness stand to read the answers as given by Mr. Steinseik in his deposition.)

Mr. Wilson: For the purposes of the record I asked these questions of Mr. Steinseik so I will be asking the questions [96] personally to Mr. Steinseik.

DEPOSITION OF WALTER R. STEINSIEK

"Q. Would you tell us your full name?

A. Walter Reeves Steinsiek.

Q. How old are you? A. 61.

Q. What is your present address?

A. Walnut Grove Motel—I don't know the number—on Baseline Avenue; it is on Baseline Avenue in Hillsboro.

Q. Hillsboro, Oregon?

A. Hillsboro, Oregon.

Q. And what is your present occupation?

A. I am retired.

Q. And what caused you to retire?

A. A heart attack.

Q. Are you presently under disability with that heart condition? A. Yes, sir.

Q. And when did you last have a heart attack?

A. August the 13th, 1960.

Q. And are you presently disabled as declared by any doctors or organizations?

A. By the Veterans Administration.

Q. Have you in the past lived in Tillamook, Oregon? A. Yes, sir. [97]

Q. How long have you lived in Tillamook, Oregon? A. 11 years.

Q. From when to when?

A. 1949 to 1960.

Q. Were you in business in Tillamook, Oregon?

A. Yes, sir.

Q. And what was your business?

A. Sign painting.

Q. And under what name or style did you do

(Deposition of Walter R. Steinsiek.)

business? A. Under Walt's Signs.

Q. Did you drive or have a truck in your business? A. Yes, sir.

Q. Did your truck have any signs or designations as to your business? A. Yes, sir.

Q. And what was the designation on your truck?

A. Walt's Signs, Phone Victor 2-4106.

Q. And where did that appear on the truck?

A. On both sides of the canopy. I have a canopy on it.

Q. Are you acquainted with the personnel working in the Safeway Store in Tillamook, Oregon?

A. Yes, I am.

Q. Are you acquainted with Raymond Strawn?

A. Yes, sir, I am. [98]

Q. And what is your acquaintanceship with him?

A. Just through a customer of the store.

Q. Did you shop at Safeway Store in Tillamook? A. Yes, sir, I did.

Q. Was it your regular market that you shopped?

A. Not the regular one; not regular, no.

Q. How often would you say that you have gone into the store in a week or a month?

A. Oh, I would say in a week's time we would generally shop the week end, Thursday and perhaps Friday of the week. Other weeks we might have been in there one or two other days, but——

Q. Over how long a period of time would you say that you were a customer? A. 11 years.

(Deposition of Walter R. Steinsiek.)

Q. Were you acquainted with any other people employed by the store other than Raymond Strawn?

A. Yes, sir, I was.

Q. Were you acquainted with a fellow by the name of John Thomas? A. Yes, sir.

Q. And who was he?

A. He was a produce man, as I understand it; a produce manager.

Q. Were you ever approached by either one of these [99] gentlemen as employees of Safeway regarding the time that you may or may not have been in the store on November 30th or December 1 of 1959? A. Yes, sir, I was.

Q. And when was that in relation to those two dates?

A. Well, I was in the store on Monday morning——

Q. Of what?

A. ——that would be the last day of November, since December 1st was Tuesday. I was there on Monday morning, November the 30th.

Q. Well, all right. Let me ask you the question, then, because I don't think that is particularly responsive to the question put.

Were you in the Safeway Store either on November 30th or December 1st of 1959?

A. Yes, sir, I was.

Q. And which day or days?

A. Monday.

Q. That would be November 30th of 1959?

A. That would be November 30th, 1959.

(Deposition of Walter R. Steinsiek.)

Q. Do you know approximately what time of day that you were in Safeway Store?

A. It is very, very difficult, but I can tell you it was between 10:00 and 11:00; to my knowledge I believe it was 10:00 to 11:00. [100]

Shall I give you the reasons for my belief?

Q. How do you know in regards to the day of the week that you were in the store and the time of day?

A. The reason that I know, it was Sunday afternoon that there was some article in the home that we ran out of, and I had some work there to do or something that I was doing and I asked my wife could it be—go until next morning, and she said yes, it would be all right, that could go to next morning. We get up at 8:00 o'clock in the morning and we have breakfast at 9:00 o'clock and then when I got finished with breakfast I went down to Safeway. That is why I say it must have been between 10:00 and 11:00 o'clock on Monday morning.

Q. How far do you live from the Safeway Store?

A. I live clear across town. It was approximately eight or nine blocks. The way I drove down 5th Street it would be eight or nine blocks.

Q. And did you drive your truck?

A. Yes, sir, I drove my truck.

Q. Now, were you approached by either one of the two gentlemen that we have just mentioned—— A. Yes, sir, I was.

(Deposition of Walter R. Steinsiek.)

Q. ——about your going into the store on either Monday or Tuesday of that week? [101]

A. It was the latter part of that week. I think Thursday was the day.

Q. And by whom were you approached?

A. John Thomas.

Q. And he is the produce man?

A. Yes, sir.

Q. And what was the reason for his contacting you?

A. He spoke to me and he said, 'Walt, do you have a little pencil about that long?' (Indicating.)

Q. And 'about that long' is about how many inches?

A. Well, that is the way he held his fingers was about that (indicating).

Mr. Peterson: There is a little ruler; I will just hold it up——

The Witness: About that long (indicating).

Mr. Peterson: About three and a half inches.

A. And I said—and larger; he said quite a large pencil; and I said, 'Yes, sir, I do.'

Q. All right. Did you do anything about seeing this pencil that he was apparently describing to you?

A. Yes, sir. He described to me what happened, and I said, 'John, I am sure that I didn't lose my pencil, because it is in a compartment in my work clothes,' and which I didn't have on at the time.

Q. That you went to the store or the day [102] you were talking to the produce man?

(Deposition of Walter R. Steinsiek.)

A. The time I am talking to the produce man.

Q. All right.

A. And I said, 'I can't get the pencil out of the pocket, so I can't see possibly how I could have lost it; but I am going home right now to see if that pencil is in my work clothes, and, if so, I am going to bring it down.' He said, 'Oh, no; you don't have to do that.' I said, 'Well, I am going to anyway, to satisfy my own mind.' So I went home to my work clothes and the pencil was there and I immediately took it down and showed it to him, and he made a remark that that wasn't exactly the kind of pencil, or something to that effect.

Q. Was that the only pencil that you carry about your person?

A. No, sir, it isn't the only one.

Q. What other type of pencils would you carry?

A. Would you like for me to show you, and the manner in which they are carried?

Q. Well, how many pencils do you carry?

A. Four.

Q. Were any of your pencils missing?

A. No, sir. [103]

Q. Do you know whether or not you dropped any pencils in any Safeway Store on Monday or Tuesday of that week?

A. I know positively well I did not.

Q. Were you ever shown the pencil that was described to you by the produce man?

A. No, sir; I never was.

(Deposition of Walter R. Steinsiek.)

Q. Did you ever talk to Mr. Strawn about the conversation between you and Mr. Thomas?

A. No, sir.

Q. Did you know Mr. Strawn by sight?

A. Yes, sir.

Q. And to converse with him?

A. Yes, sir.

Q. And did you back in November and December of '59? A. Yes, sir, I did.

Q. Is this all that you know about any pencil incident that occurred in Safeway Store on the dates mentioned, as far as the incident happening?

A. I—it is all that I know that I am relating now.

Q. With your heart condition is it possible for you to appear in court on November 14th of 1960?

A. According to what the doctors of the Veterans have told me and my private doctor down there, no, I [104] can't.

Mr. Wilson: Off the record a minute.

(Discussion off the record.)

Mr. Peterson: Are you done now?

Mr. Wilson: I rest."

Mr. Tooze: "Cross-examination by Mr. Peterson:

"Q. Mr. Steinsiek, you were going to describe the pencils that you used, four pencils, you said. Would you describe those, please?

A. Yes, sir. Two of them are grease pencils, we call them grease pencils; one is white and one is

(Deposition of Walter R. Steinsiek.)

black. The other is a common ordinary lead pencil. Those three pencils have clips on them that hold them in my overalls. The other pencil is a short pencil about that long (indicating), that is round, black and larger than the ordinary pencil. It has no clip on it, but it has a compartment that fits down in the side of the bib of my overalls in which it is quite secure. Those are the——

Q. Are these grease pencils the same type that you have seen—— A. They are not.

Q. Let me finish my question.

A. I am sorry.

Q. I beg your pardon for interrupting, but I want to [105] finish this question first.

Are these the same type of grease pencils that you see in stores used for marking merchandise?

A. That is right.

Q. Now, this fourth pencil, was that sharpened on one or both ends? A. One end.

Q. And you say it was black?

A. It is black lead and a black casing.

Q. Do you know anything about a man that fell in the Safeway Store on November 30th, 1959?

A. Only what John Thomas told me.

Q. Do you recall what the article was that you purchased? A. No, sir; I do not.

Q. What do you wear when you work, Mr. Steinsiek? A. I wear striped bib overalls.

Q. Do you have more than one pair of overalls?

A. Yes, sir; I have two pair.

Q. But do you have only four pencils, or do you

(Deposition of Walter R. Steinsiek.)

have extra pencils in the truck or at your workshop?

A. In my studio at home I have extra pencils.

Q. Have you talked about this accident to anybody other than Safeway Store personnel?

A. No. [106]

Q. Have you——

A. I gave a statement to the—this office.

Q. To Mr. Wilson's office?

A. Yes, sir. I gave a statement to Mr. Wilson's office.

Q. And when was that, sir?

A. I can't remember. The date must be on it.

Q. Was it recently?

A. Oh, it was after I had the attack. The attack was August 13th and it was after that, but—may I add something to that question?

Q. Yes.

A. I met Mr. Strawn about a week or ten days ago, the first time I had seen him since I had given that statement, and I asked him why did he bring my name into this when I was not even remotely involved in it; and he said he was under oath and they asked him was anyone else in the store that morning and he had to give my name.

Mr. Wilson: I move that all be stricken as volunteered.

Mr. Peterson: I don't have any more questions."

Mr. Wilson: I move that all be stricken as voluntary. I withdraw that objection, your Honor.

Mr. Tooze: I have no further questions. [107]

(Deposition of Walter R. Steinsiek.)

Mr. Wilson: "Redirect examination by me.

"Q. Mr. Steinsiek, do you remember how many people were in the store at the time that you shopped in Safeway on this Monday morning that you related to us, or if there was anyone there at all?

A. There was others in there, perhaps three or four; there wasn't very many. I will say three or four.

Q. Do you remember whether you walked around the store or whether you went to a definite station, or do you remember?

A. Well, I tell you, I walked down the left-hand aisle of the store and turned to the—at the meat counter and came over by the bread counter and then to the register. Now, that is my general route in that store. I sometimes stop at that coffee, but that is on the way down that aisle.

Q. Now, when you say it is a general route, do you have any specific knowledge of what route you took this particular day?

A. No; I can't say. I can't do it.

Mr. Wilson: Any more questions, Mr. Peterson?

Recross-Examination

By Mr. Peterson:

Q. You don't recall who any of the people were in the store when you were in there? [108]

A. No, sir, I certainly—I just do not.

Q. If you saw them again would you be able to

(Deposition of Walter R. Steinsiek.)

recognize them? A. No.

Mr. Peterson: That is all I have."

The Court: Is that the close of the deposition?

Mr. Wilson: No, your Honor. We opened it again.

Mr. Tooze: Now I'd like to have the record show that at 11:45 o'clock a.m. on the date of this deposition, which was taken on November 12th, 1960, beginning at 11:30 a.m. in the offices of the plaintiff's attorneys in the Cascade Building in the City of Portland, Oregon—at 11:45 a.m. the deposition was concluded but was reopened at 12:05 p.m. of the same day.

"Mr. Peterson: Are we reopening this as my witness or your witness? I don't know whether it will make any difference; it just depends on who goes first.

Mr. Wilson: I will reopen it."

Mr. Wilson: These are questions again put by me to Mr. Steinsiek:

"Q. Mr. Steinsiek, you have brought with you today your overalls that you use in your work?

A. Yes, sir.

Q. And with your overalls you have also brought with you the pencils that you carry with you at work? A. Yes. [109]

Mr. Wilson: No, John, can we have the overalls and all the pencils——

Mr. Peterson: Well, Don, I think we should have the pencils marked individually, because that

(Deposition of Walter R. Steinsiek.)

will just simplify things. You can mark the whole things, but the pencils are so easily——

Mr. Wilson: Mark the overalls Deposition Exhibit No. 1; and the green plastic pencil as Exhibit 2; the green regular pencil with a clip on it as Exhibit 3; the black plastic pencil with a clip on it as Exhibit 4; and the black pencil with a point at one end as Exhibit 5."

The Court: Now, we will have to renumber them for our purposes.

Mr. Wilson: That's correct, your Honor.

The Court: Is that 6-A through -E that you reserved?

Mr. Wilson: Yes, sir.

The Court: Very well. Let them be marked in their sequence.

Mr. Tooze: That would be exhibit——

The Court: 6-A, -B, -C, -D, and -E. You may step down and do that, Mr. Clerk.

(At this point the Clerk did as requested.)

(At this point the Clerk resumed the witness stand and resumed his pseudo capacity.) [110]

"Q. (By Mr. Wilson): Now, going back, Mr. Steinsiek, to the overalls that were marked for the purposes of identification Deposition Exhibit No. 1, are those the overalls?

A. Yes, sir, those are the overalls."

The Court: Now, that is No. 6 or 6-A?

Mr. Wilson: 6-A, your Honor.

(Deposition of Walter R. Steinsiek.)

The Clerk: That is 6-A, sir.

"Q. (By Mr. Wilson): And did you have more than one overalls that you were wearing back in December of 1959?

A. Yes, yes; I have another pair.

Q. Are they of the same type?

A. Exactly the same type.

Q. And are these the same pencils that you used back in that time?

A. Those are exactly the same ones, yes, sir.

Q. Now, making specific reference to"——

Your Honor, should I then revert to the Pre-trial Order?

The Court: No. 2 will be 6-B, and so on.

"Q. (By Mr. Wilson): Now, making specific reference to Exhibit No. 6-E, where do you carry that pencil?

A. Right where it is now in that little compartment.

Q. And that is the little compartment of the bib of the overalls on the right?

A. Yes, sir, on the right. [111]

Q. Now, would you describe how you get that pencil out of the pocket when you are wearing the overalls?

A. I begin at the bottom with my finger and I begin to push up from the bottom until I can get it far enough out that I can reach it from the top.

Q. When you were in the store that particular morning do you remember picking up anything off the floor or reaching over for anything off the floor?

(Deposition of Walter R. Steinsiek.)

A. No, sir.

Q. Do you know whether or not specifically that you were wearing those particular overalls when you went in the Safeway store?

A. No, sir, I do not.

Q. Would you tell us what you use the short black pencil for? A. It is principally——

Q. That is Exhibit 6-E.

Q. ——for lay-outs on paper banners, show cards, or other rough surfaces, like a rough piece of plyboard, a wall, a concrete wall; it is very good for a lay-out on a concrete wall.

Q. How many pencils like that did you have back in December, '59?

A. That is it, the only one.

Q. Do you ever sharpen the pencil at both ends? [112] A. Never.

Q. Or a pencil of that nature?

A. No, sir, never.

Q. You say that those pencils are used for banners like the type of banners that Safeway uses in their stores?

A. I have never made any for Safeway, but it is the same type, same type banner.

Q. Do you know whether or not there is personnel of Safeway who makes banners for Safeway?

A. They have an employee that makes their banners, yes.

Q. Right there at the Safeway Store?

A. Yes, sir.

(Deposition of Walter R. Steinsiek.)

Q. And is that type of pencil what you would use in making Safeway banner?

A. Not everyone uses that type of pencil, but I use it for that purpose.

Q. Is this a common type pencil in your particular trade and profession?

A. No, it is not common.

Q. Are you familiar with that type of pencil and what it is used for, and is it used for what you just described?

A. Well, it is originally an art pencil, [113] but——

Q. Are you an artist?

A. No, sir, I am not an artist.

Q. What type of work do you engage in in your sign work?

A. In all phases of sign work except neon.

Q. Is that lay-out as well as painting?

A. The lay-out as well as the painting, both water color and all oil color.

Q. The pencil that is Exhibit 6-E, do you know where that pencil was purchased or acquired by you? A. Yes, sir.

Q. Where? A. At Kenwood.

Q. Where is that?

A. On 3rd Street in Tillamook.

Q. Where is that in relation to the Safeway Store?

A. It is on the same street about three blocks east of Safeway.

(Deposition of Walter R. Steinsiek.)

Q. Is it a general supply store for stationery and—— A. Yes, sir.

Q. ——that type of goods? A. Yes, sir.

Mr. Wilson: I have no further questions.

Recross-Examination

By Mr. Peterson: [114]

Q. Mr. Steinsiek, Mr. Wilson asked you if you were wearing these overalls that morning, and you said you couldn't be sure. A. Yes, sir.

Q. You were wearing a pair of overalls that morning; is that right?

A. I can't be sure there.

Q. If you were wearing a pair of overalls it would have been either this pair or another one?

A. It would have been that one or another one.

Q. And whichever pair of overalls you were wearing that morning, if you were wearing overalls, that would have also had these four pencils in them; is that correct?

A. Yes, sir, they would; they would have had those four pencils.

Q. Now, this pencil, Mr. Steinsiek, you said you used it for what purpose?

A. For lay-outs on rather rough surfaces, including paper banners and even showcards. They are not rough but that is very soft lead and you can make a very fine mark with it.

Q. Would this be used to sketch in the general outline? A. Yes. [115]

(Deposition of Walter R. Steinsiek.)

Q. Now, you have been in the sign painting business since November 30th, 1959, to what date?

A. No; I have been in the sign business in Tillamook since 1953.

Q. I understand that, but since November, 1959, how long did you continue in the sign painting business? A. Until August the 13th, 1960.

Q. Have you had much need for this pencil during the period from November 30th, 1959, to August 13th, 1960? Have you used that very much?

A. I tell you the truth, I don't think it has been out of the overalls except to change it. I don't think I have used—I know I haven't.

Q. Now, how long is this pencil when it is purchased new? How long was this particular pencil, Exhibit No. 6-E?

A. That pencil new was just twice that long (indicating), I would say.

Q. All right. I might say, Mr. Steinsiek, when did I first become aware of this pencil, Exhibit No. 6-E? A. Just a few moments ago.

Q. And that was after the deposition adjourned temporarily? A. Yes, sir, it was.

Q. Now, since that time I have procured this [116] envelope in which there is an exhibit. This envelope is marked Pretrial Exhibit No. 11, and on the outside are marked the words 'large pencil, three and a half inches long.' I will show you this pencil and ask you if you recall ever seeing that before.

A. No, sir, I do not; and it is sharpened on a pencil sharpener and I sharpen mine with a knife."

Mr. Tooze: Now, if your Honor please, the exhibit that was just referred to——

The Court: No. 11?

Mr. Tooze: ——is Exhibit 11 in the Pretrial Order.

The Court: Can you find it, Mr. Roberts?

Mr. Tooze: Yes, sir. It would be the same—I have the exhibit in my possession.

The Court: Oh. Is that reserved?

Mr. Tooze: No. It's marked as Exhibit 11 on the Pretrial Order so there is no change in the number.

The Court: Well, does the Clerk have it or do you have it in your possession?

Mr. Tooze: I have it in my possession. I will be glad to deliver it to the Clerk.

The Court: Let's have it identified.

Mr. Tooze: Yes.

(At this point Mr. Tooze handed the exhibit to the Clerk for marking.) [117]

* * *

Mr. Wilson: Well, plaintiff will offer all of our exhibits that have been marked, your Honor. Those are the X-rays as 1-A and -B, the deposition of Mr. Walt Steinsiek, which is No. 3, the hospital record which is Exhibit——

The Court: Just a moment. The deposition of Mr. Walt Steinsiek will be marked for identification No. 3. It's been read in evidence. The hospital records may be——

Mr. Wilson: St. Vincent's, No. 4.
The Court: Any objection to No. 4?
Mr. Tooze: No objection.
The Court: They will be received. [118]

(At this point Plaintiff's Exhibit No. 4, previously marked for identification was received in evidence.)

Mr. Wilson: Providence Hospital, No. 5.
The Court: Any objection?
Mr. Tooze: No objection.
The Court: It will be received.

(At this point Plaintiff's Exhibit No. 5, previously marked for identification, was received in evidence.)

Mr. Wilson: 6-A through -E, the overalls, and——
The Court: Any objection?
Mr. Tooze: No objection.
The Court: They will be received.

(At this point Plaintiff's Exhibits 6-A through -E, previously marked for identification, were received in evidence.) [119]

* * *

DEPOSITION OF WALTER R. STEINSIEK
(Continued)

Mr. Wilson: Now, we go back again to redirect examination.

"Q. Counsel asked you as to when you saw this pencil. As a matter of fact, this pencil was shown—all of us were shown, counsel and the court reporter, by you at the same time, was it not?

A. Uh-huh, yes, sir.

Q. And it wasn't a matter of anyone else seeing it first. You just showed it to us together and that was when the deposition was reopened.

Mr. Peterson: I have one more question.

Recross-Examination

By Mr. Peterson:

Q. You said you gave a statement to somebody from Mr. Wilson's office. Did you show these pencils to him? A. I sure did.

Q. Did you show him this black pencil, Exhibit No. 6-E?

A. I sure did—and I told him—I showed him where it was, just exactly as I am showing you now."

Mr. Wilson: No further questions.

Mr. Tooze: That ends it, your Honor. [120]

WILMA JEWEL FANNAN

produced as a witness on behalf of the plaintiff, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

By Mr. Wilson:

Q. You are the wife of Marvin Fannan?

A. Yes, I am. [121]

* * *

Q. Now, you were in the car, were you not, which was driven to the Safeway parking lot?

A. Yes, I was.

Q. Do you know what time of day it was approximately?

A. Well, it was about 9:30 in the morning.

Q. You did not go in the store yourself?

A. No; I stayed in the car with my niece and my daughter. [122]

Q. When did you first see your husband?

A. Well, after he went into the store the first time I saw him was when he called to his brother-in-law to come and help him back to the car. His sister was helping him in. [123]

* * *

Cross Examination

By Mr. Tooze:

* * *

Q. Now, what time did you say you got to the store?

(Testimony of Wilma Jewel Fannan.)

A. I believe it was 9:30. Or maybe it was 9:00. I'm not sure.

Q. 9:00 or 9:30? A. Yes, sir.

Q. Then you didn't go in the store? [130]

A. No, I didn't. [131]

* * *

Mr. Tooze: If your Honor please, at this time the plaintiff having rested his case, the defendant moves the Court for an order directing the jury to return a verdict in favor of the defendant for the reasons and on the grounds that there is no evidence proving or tending to prove that the defendant was negligent in any of the particulars claimed by the plaintiff, or at all; that there is no evidence proving or tending to prove that any act or conduct on the part of the defendant was a proximate cause of any injuries or damages sustained by the plaintiff; on the further ground that the evidence affirmatively shows that the conduct of the plaintiff himself in not paying attention where he was going was negligence as a matter of law which proximately contributed toward causing his accident and injuries. I would like to argue the motion, your Honor.

The Court: All right. [132]

Mr. Tooze: I would like this for the record.

I would like to point out for your Honor that there is no evidence in this case from which a jury may properly infer that the defendant Safe-

way Stores was responsible for the presence of this pencil on the floor which the witnesses have identified as a plastic pencil.

It is not connected in any way with the defendant Safeway Stores.

The further ground there is no evidence as to showing how long that condition had existed or that there was any actual knowledge of the condition on the part of the defendant.

A further ground is it would be wholly speculative the way the evidence now stands as to whether or not any act or conduct of the defendant Safeway was responsible for it. I am sure your Honor is familiar with the case of Cowden vs. Earley, the Oregon case decided by——

The Court: Down in Eugene?

Mr. Tooze: That's in Eugene. And in that case—I wonder if I could get that book. I'd like to——

The Court: Yes, you may. You can ask the bailiff to get it for you.

Mr. Tooze: Would you bring 214 Oregon, please? And also 35.

The Court: Down in the Osburn Hotel.

Mr. Tooze: That's right. Also 35 Am. Jur. [133]

This is the case of Cowden vs. Earley, 214 Ore. 384.

It involved a matter of slipping and falling in the Osburn Hotel.

The Court said—Judge McAllister said "The rule of law applying to a case of this kind is well established. An invitee who is injured by slipping on a foreign substance on the floor or stairs of

business property must in order to recover from the occupant having control of said property show either, A, that the substance was placed there by the occupant or, B, that the occupant knew that the substance was there and failed to use reasonable diligence to remove it or, C, that the foreign substance had been there for such a length of time that the occupant should by the exercise of reasonable diligence have discovered it and removed it."

Now, there is no evidence that this pencil was placed there by the defendant Safeway Stores. The only evidence here is that there was a plastic pencil which is sometimes used for marking merchandise.

B, that the occupant knew that the substance was there, there is no evidence here of any knowledge on the part of Safeway Stores or any of its employees.

And C, that the foreign substance had been there for such a length of time that the occupant should by the exercise of reasonable diligence have discovered and removed it, there is no evidence here whatever as to the length of time that this **[134]** pencil was on the floor prior to this fall.

Now, with respect to— it probably will be argued by counsel that the fact that it was a marking pencil, that is enough to connect Safeway. But, your Honor, that isn't enough. Let's assume that it was even a Safeway pencil. Suppose that was an admitted fact. That wouldn't be enough in this case, for this reason: The creation of the dangerous condition must have been a negligent act.

It might have been wholly accidental on the part of a safeway employee. Also—and this is very important—in order to impose liability on Safeway because of the presence of this pencil, if we say that it was a Safeway pencil or the jury could infer it we would have to show that it got there while the employee was doing something in the furtherance of the business of his employer. It must be done within the scope of his employment. And on that there is absolutely no evidence whatever. [135]

* * *

Now, on the question of the matter of the—assuming now that this pencil belonged to a Safeway employee, before the defendant can be held liable for creating this condition it must be shown that that condition was created by the defendant's employee while he was doing something in the scope of his employment; in other words, in the furtherance of Safeway's busines. There is absolutely no evidence of that here at all. [137]

* * *

Now, the inference in this case that the pencil was there for—by some act of the Safeway employee. But assuming that it was not by an act of the Safeway employee, then it was there a sufficient length of time somewhere about the store on the floor, presumably, or inferably, and that Safeway could be charged with the notice.

Now, the cases that counsel cites——

The Court: Now, let's discuss that point a little more because that has me disturbed. The testimony of the plaintiff's case is that these two people were the first people in the store.

Mr. Wilson: Yes; the only—there was three people in the store. There is two people in the store other than Safeway employees.

The Court: These are the first customers in the store.

Mr. Wilson: That's right, your Honor. The door was opened, [142] by Wanda Perrigo's testimony, she called her brother in and the two went in the store and went—walked directly for this aisle that they were walking down. Now, in opening statement counsel says that Safeway employees were walking up and down the aisleway, probably inferring that there was no pencil there. I don't know whether counsel is bound by his statement in opening statement. But I think the defendant is charged with the responsibility. However, I don't think that's of necessity——

The Court: Well, the sister walked down immediately in front of him.

Mr. Wilson: That's correct, your Honor. That's correct, your Honor. The sister walked first. She didn't see any pencil. Marvin Fannan was behind her.

The Court: Let's say she didn't step on any pencil.

Mr. Wilson: She said she didn't see or step on any pencil.

The Court: Well, the plaintiff didn't see the pencil. Certainly if he saw it and stepped on it he wouldn't have any claim.

Mr. Wilson: That's more than certain.

The Court: He didn't see it either. The first two people in there didn't see it.

Mr. Wilson: That's correct, your Honor.

The Court: Now, let's get rid of this notice. Let's find out who caused the creation.

Mr. Wilson: All right. In regard to who caused or created [143] this, your Honor, there are only two possibilities and only two specifications of negligence left in this Pretrial Order. The rest of them were stricken. One was that they deposited the pencil there or they permitted the pencil to remain. Now, if the Safeway personnel were the only ones there, it naturally follows, it has to be inferred from that very fact in existence that the store just opened and these people the only ones in the store, that Safeway personnel were the only ones there.

Now, if they didn't put it there someone else had to put it there. But there is no testimony. We are asked to speculate.

Counsel says that we are speculating. Your Honor could take the opposite point of view and say that there isn't a jury question here, it's speculating in behalf of the defense and against the plaintiff.

The Court: Well, then, I have got to disbelieve the plaintiff's case, then. They say that they were the first people there.

Mr. Wilson: That's right, your Honor.

The Court: Now, there couldn't have been anybody else.

Mr. Wilson: That's what I say, your Honor, there couldn't be anyone else.

The Court: They didn't see it and they walked right by it.

Mr. Wilson: That's correct, your Honor.

The Court: Well, then, why would Safeway people see it? [144]

Mr. Wilson: They have the responsibility of furnishing a safe premise on which to shop.

The Court: The plaintiff has the responsibility to exercise due care for his—measured by the same responsibility.

Mr. Wilson: But we are talking about whether or not liability has been established.

The Court: No. I think I am satisfied. Here we have in this case plaintiff, under his own testimony, after the store has been opened he was preceded by a witness on his own behalf, a relative. He claims that he fell upon something that neither she saw nor stepped upon. There is, correct, evidence in the case, giving plaintiff's evidence the most favorable light in the matter, some object which he claims he stepped on. He says that he looked back 10 or 15 feet and saw it spinning like a top.

Outside of that there is no employee of Safeway put in the area, there is no testimony that they ever saw an employee.

The testimony is to the effect that the sister went clear to the meat counter to advise him that somebody had fallen and in due time.

I'm content to say for the record in this case I have never seen a plainer case that was more speculative in the causation of the accident than this case. I grant the motion for dismissal.

Mr. Wilson: I take exception to the Court's ruling and [145] order a transcript of the testimony.

The Court: You certainly may have it.

Mr. Tooze: If your Honor please, I have already furnished the Court with a form of verdict. I think it will probably need to be amended.

The Court: This is an order of dismissal.

Mr. Tooze: I see.

The Court: Rule 41 provides that after the plaintiff has completed presentation of his evidence the defendant, without waiving his right to offer evidence in the event of the motion not granted, may move for dismissal on the grounds that upon the facts and the law the plaintiff has shown no right to relief. That's the way I feel about it. [146]

* * *

(At this point the jury returned to the courtroom and the following proceedings occurred:)

The Court: Members of the jury, you have been called today and selected to sit on a case and try the case before the Court. You have heard the testimony that has been produced and you have heard the rulings of the Court during the course of the trial.

During your absence the defendant has made a motion pursuant to the Rules of Federal Civil Procedure for an order of dismissal on the grounds and for the reason that the plaintiff's case, taking it as it now stands, shows no grounds in either law or fact that relief could be granted.

The Court has heard the legal arguments of counsel and discussed the factual situation with counsel, and the Court has come to the conclusion that under the law Safeway Stores is not a guarantor of the safety of any individual doing business with it in the store and that it owes to its customers the duty that you and I owe to each other in our ordinary daily lives not to be negligent towards that person to the extent that it would cause him injury.

The Court has concluded that under the evidence presented to the close of the plaintiff's case there has been no evidence that would present any question of fact to you as members of the jury as to negligence on the part of the Safeway Store people. Therefore, accordingly, as a matter of law the Court has granted an order of dismissal.

* * *

[Endorsed]: Filed April 13, 1961. [147]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Petition for Removal with complaint attached and marked "Exhibit A"; Answer and demand for jury trial; Pretrial order; Judgment of dismissal; Motion to amend judgment; Motion for new trial; Order denying defendant's motion to amend judgment; Order denying plaintiff's motion for new trial; Notice of appeal by Safeway Stores, Incorporated; Bond for costs on appeal; Notice of appeal by Marvin Fannan; Bond for costs on appeal; Concise statement of points on appeal; Stipulation and order for extension of time to docket appeal; Order directing Clerk to forward exhibits to Court of Appeals; Joint designation of contents of record on appeal; and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 60-170, in which Safeway Stores, Incorporated, is appellant and Marvin Fannan is appellee on the first Notice of Appeal and Marvin Fannan is appellant and Safeway Stores, Incorporated, is appellee on the second Notice of Appeal; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed

by the appellant and appellee, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of proceedings filed in this office in this cause. Under separate covering we are forwarding Exhibits 3, 6a, 6b, 6c, 6d, 6e, and 11.

I further certify that the cost of filing the Notice of Appeal, $5.00 each, has been paid by the appellant and appellee.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 21st day of April, 1961.

[Seal] R. DeMOTT,
Clerk,

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 17315. United States Court of Appeals for the Ninth Circuit. Safeway Stores, Incorporated, Appellant, vs. Marvin Fannan, Appellee, and Marvin Fannan, Appellant, vs. Safeway Stores, Incorporated, Appellee. Transcript of Record. Appeals from the United States District Court for the District of Oregon.

Filed April 22, 1961.

Entered in Docketed April 27, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 17315

MARVIN FANNAN (Misnamed in Plaintiff's Complaint as MARVIN FANNON),

Appellant,

vs.

SAFEWAY STORES, INCORPORATED,

Appellee,

and

SAFEWAY STORES, INCORPORATED,

Appellant,

vs.

MARVIN FANNAN (Misnamed in Plaintiff's Complaint as MARVIN FANNON),

Appellee.

PLAINTIFF-APPELLANT'S CONCISE STATEMENT OF POINTS ON APPEAL

Comes now plaintiff-appellant Marvin Fannan, and as his statement of points on appeal in the above-entitled cause states:

The Court erred in granting defendant's motion made at the close of plaintiff's cause for a dismissal thereof, and in entering a judgment of dismissal of plaintiff's cause of action.

Respectfully submitted,

POZZI, LEVIN & WILSON,

/s/ PHILIP A. LEVIN,
Of Attorneys for Plaintiff-
Appellant Marvin Fannan.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 28, 1961.

[Title of Court of Appeals and Cause.]

CONCISE STATEMENT OF POINTS ON APPEAL OF DEFENDANT SAFEWAY STORES, INCORPORATED

The points upon which the defendant will rely on its appeal are:

1. The court erred in not treating defendant's motion for a directed verdict made at the conclusion of the plaintiff's case as a motion for a directed verdict under Rule 50, Federal Rules of Civil Procedure, the granting of which operates as an adjudication upon the merits.

2. The court erred in dismissing the action without prejudice under Rule 41, Federal Rules of Civil Procedure in response to a motion by defendant at the conclusion of plaintiff's case for a directed verdict under Rule 50, Federal Rules of Civil Procedure, after ruling that the plaintiff's evidence was insufficient to support a judgment in his favor.

3. The court, after discharging the jury, following defendant's motion for a directed verdict under Rule 50, Federal Rules of Civil Procedure, and following a ruling by the court that the plaintiff's evidence was insufficient to support a judgment in his favor, erred in dismissing the action without prejudice under Rule 41, Federal Rules of Civil Procedure as the only means then available to remedy the error in failing to direct a verdict was a judgment of dismissal having the effect of an adjudication on the merits.

4. The court erred in denying defendant's motion to amend the judgment by deleting the words "without prejudice" at the end of the body thereof.

/s/ LAMAR TOOZE,
Of Attorneys for Defendant-Appellant Safeway Stores, Incorporated.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 2, 1961.

[Title of Court of Appeals and Cause.]

STIPULATION FOR AND DESIGNATION OF CONTENTS OF PRINTED RECORD ON APPEAL

* * *

It is further stipulated between the parties that the cost of printing the record on appeal be divided equally between the parties, without, however,

prejudicing either party to claim his or its share of the cost of printing the record in the event that costs are allowed in the party's favor upon final determination of the appeal.

Dated this 26th day of April, 1961.

/s/ PHILIP A. LEVIN,
Of Attorneys for Appellant and Appellee Marvin Fannan.

/s/ EDWIN J. PETERSON,
Of Attorneys for Appellant and Appellee Safeway Stores, Inc.

[Endorsed]: Filed May 2, 1961.

No. 17,317

United States Court of Appeals

For the Ninth Circuit

LAVERE REDFIELD,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Nevada

APPELLANT'S OPENING BRIEF

GRUBIC, DRENDEL & BRADLEY,
WILLIAM O. BRADLEY,
304 Medico Dental Building,
130 North Virginia Street,
Reno, Nevada,
Attorneys for Appellant.

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No. 17,317

United States Court of Appeals

For the Ninth Circuit

LAVERE REDFIELD,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

Appeal from the United States District Court for the District of Nevada

APPELLANT'S OPENING BRIEF

STATEMENT AS TO JURISDICTION

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal pursuant to 28 *United States Code,* Sec. 1291, which provides:

"Sec. 1291. *Final decisions of district courts.*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

The appellant on October 28, 1960, was convicted by a jury on six counts of an eight-count indictment charging him with income tax evasion under Section 145 (b), Internal Revenue Code of 1939; 26 United States Code, 1939 Edition, Section 145 (b), and Section 145 (b), and Section 7201, Internal Revenue Code of 1954; 26 United States Code, 1954 Edition, Section 7201 (Rec. p. 2). A motion for new trial was timely filed by appellant on November 3, 1960 (Rec. p. 30), argued on March 3, 1961 (Rec. p. 122), and denied on March 23, 1961 (Rec. p. 123). A notice of appeal from the judgment of conviction and order denying the motion for new trial was timely filed on March 27, 1961 (Rec. p. 180). A statement of points and designation of record was filed by appellant in this Court on April 28, 1961. The record on appeal was filed in this Court on April 26, 1961.

This Court has jurisdiction of this appeal pursuant to 28 *United States Code,* Sec. 1291 and Rule 37 of the *Federal Rules of Criminal Procedure.*

STATEMENT OF THE CASE

On May 26, 1960, the appellant was indicted by a Federal Grand Jury on an eight-count indictment charging him with income tax evasion under Section 145 (b), Internal Revenue Code of 1939; 26 United States Code, 1939 Edition, Section 145 (b), and Section 7201, Internal Revenue Code of 1954; 26 United States Code, 1954 Edition, Section 7201 (Rec. p. 2). The appellant was arraigned before the Honorable

John R. Ross on June 16, 1960 (Tr. Vol. I, p. 3). At the arraignment, the appellant, appearing without counsel, entered a plea of not guilty to each of the separate counts of the indictment (Tr. Vol. I, p. 10). Following the arraignment, the matter was placed upon the jury trial calendar for trial at a date as early as possible and bail was continued in the sum of ten thousand dollars (Tr. Vol. I, p. 10). On October 4, 1960, trial by jury commenced in the United States District Court for the District of Nevada at Carson City, Nevada. Throughout the course of the trial, appellant appeared without counsel. On October 28, 1960, a petit jury returned a verdict of guilty as charged on counts I, II, III, V, VI and VII and not guilty on counts IV and VIII (Rec. p. 28). Following the return of the verdict, the Court adjudged the appellant guilty in conformity with the verdict (Tr. Vol. VIII, pp. 2109, 2110). The Trial Court then continued the case until the 10th day of November, 1960 at the hour of 1:30 o'clock p.m. at Las Vegas, Nevada, for the purpose of imposition of sentence (Tr. Vol. VIII, p. 2110). The Trial Court then revoked the appellant's bail and remanded him to the custody of the United States Marshal (Tr. Vol. VIII, p. 2110).

On November 2, 1960, appellant retained the firm of Grubic, Drendel & Bradley, Reno, Nevada, to represent him in this matter. On November 3, 1960, appellant, through his counsel, filed a motion for new trial (Rec. p. 30). The motion for new trial was set for hearing on November 10, 1960. On November 10,

1960, the appellant was sentenced to pay a fine of ten thousand dollars on each of six counts, or a total fine of sixty thousand dollars, together with costs of prosecution and to serve a term of five years on each of six counts, said prison terms to run concurrently, and the appellant was remanded to the custody of the Attorney General, or his authorized representative (Rec. pp. 33, 34). Argument on the motion for new trial was continued until counsel for appellant had an opportunity to review the trial transcript. The motion for new trial was argued on March 3, 1961. On March 23, 1961, the Court entered its written order denying appellant's motion for new trial (Rec. p. 123). On March 27, 1961, a notice of appeal was filed (Rec. p. 180). The record on appeal was docketed on April 26, 1961.

Throughout the pre-trial and actual trial of the case in the Court below, the appellant was not represented by counsel. Immediately following his conviction, appellant retained present counsel to represent him in this matter. A motion for new trial was urged in the Trial Court which raised the following points:

1. Appellant was not capable of competently and intelligently waiving his constitutional right to assistance of counsel, and, therefore, there was no waiver by appellant of his right to be represented by counsel.

2. Assuming for the sake of argument but without conceding that there was a proper waiver of his right to counsel by appellant, the appellant was nevertheless denied his constitutional right to a fair and impartial trial because appellant, acting as his own counsel, was

not capable of conducting his own defense, and the record in the trial in this case establishes that the appellant was so ignorant of law and procedure and his defense was so inadequate and incompetent that he has been deprived of his liberty in violation of his rights under the *Sixth Amendment to the Constitution of the United States.*

3. Appellant was denied an impartial trial by virtue of the prejudicial nature of the Trial Court's treatment of appellant in the presence of the jury throughout the course of his trial.

4. The attorney for appellee during his closing argument appealed to the passion and prejudice of the jury concerning irrelevant matters, thereby intending to inflame the jury against the appellant.

QUESTION INVOLVED

Did the appellant in the Court below receive that fair and impartial trial to which every accused is entitled under the Constitution and Laws of the United States of America?

SPECIFICATIONS OF ERROR

1. It was error for the Trial Court to proceed with the trial in this cause without first determining whether or not the appellant was capable of competently and intelligently waiving his constitutional right to the assistance of counsel.

2. It was error for the Trial Court not to intervene when it became apparent to the Court during the course of the trial that the appellant was so ignorant of law and procedure and his defense was so inadequate and incompetent as to reduce the trial to a sham and a farce.

3. It was error for the Trial Court to harass and belittle appellant in the conduct of his defense in the presence of the jury throughout the course of the trial. The prejudicial nature of the Trial Court's treatment of appellant in the presence of the jury throughout the course of the trial resulted in a denial to appellant of a fair and impartial trial.

4. It was error for the Trial Court to permit the attorney for the appellee during his closing argument to appeal to the passion and prejudice of the jury concerning irrelevant matters, thereby intending to inflame the jury against the appellant.

SUMMARY OF ARGUMENT

The Appellant in the Court Below Did Not Receive That Fair and Impartial Trial to Which Every Accused Is Entitled Under the Constitution and Laws of the United States of America for the Following Reasons:

I

Appellant, a layman with a high school education though eminently successful in acquiring wealth, was incapable of competently and intelligently waiving his

right to the assistance of counsel. His decision to proceed without counsel was in fact the opposite of an intelligent and competent decision but was rather an emotional and irrational decision. The Court below failed to determine on the record whether there was an intelligent and competent waiver by the appellant of his right to counsel prior to trial as required by law.

II

Appellant acting as his own counsel throughout the pre-trial and trial of this case in the Court below was not capable of conducting his defense and the record of the trial establishes that appellant was so ignorant of law and procedure and his defense was so inadequate and incompetent that he has been deprived of his liberty in violation of his rights under the *Sixth Amendment to the Constitution of the United States.* The Trial Court failed in its duty to appellant appearing without counsel to see that the essential rights of appellant were preserved by appropriate intervention when it became apparent during the trial that appellant was incapable of conducting his defense.

III

Appellant throughout the course of the trial in the presence of the jury was constantly harassed and belittled by the Trial Judge. The Trial Judge commenced interrupting and belittling appellant in the first sentence of appellant's opening statement to the jury and continued this conduct through the final sentence of appellant's closing argument. The preju-

dicial nature of the Trial Court's treatment of appellant in the presence of the jury throughout the course of the trial precluded appellant from receiving a fair and impartial trial.

IV

The attorney for appellee during his closing argument appealed to the passion and prejudice of the jury concerning irrelevant matters, thereby intending to inflame the jury against the appellant.

ARGUMENT

I

APPELLANT WAS NOT CAPABLE OF COMPETENTLY AND INTELLIGENTLY WAIVING HIS CONSTITUTIONAL RIGHT TO ASSISTANCE OF COUNSEL, AND, THEREFORE, THERE WAS NO WAIVER BY APPELLANT OF HIS RIGHT TO BE REPRESENTED BY COUNSEL.

See Affidavit of Raymond Milton Brown, M.D. (Rec. p. 62).

See Affidavit of Rudolph B. Toller, M.D. (Rec. p. 68).

The decision of the Supreme Court of the United States, decided May 23, 1938, *Johnson v. Zerbst,* 304 U. S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019, 146 A. L. R. 357, is the landmark case followed exhaustively by the Courts of the United States concerning the waiver by an accused of his constitutional right to be represented by counsel assured an accused by the *Sixth Amendment to the Constitution of the United States.*

In this case, petitioner and another man, both enlisted in the Marine Corps, were arrested in South Carolina on November 21, 1934, charged with feloniously uttering, possessing and passing counterfeit money. They were bound over to await action of the United States Grand Jury but were kept in jail due to inability to give bail. On January 21, 1935, they were indicted. On January 23, 1935, they were taken to Court and there first given notice of the indictment, immediately were arraigned, tried, convicted and sentenced that same day to four and one-half years in the penitentiary. On January 25, they were transferred to the federal penitentiary in Atlanta, Georgia. Counsel had represented them in the preliminary hearing two months prior to trial in which they were bound over to the Grand Jury. The accused were unable to employ counsel for their trial. At arraignment, both pleaded not guilty and said they had no lawyer, and, in response to an inquiry of the Court, stated that they were ready for trial. They were then tried, convicted, and sentenced without assistance of counsel. This case was before the Supreme Court of the United States on a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit to review a judgment affirming a judgment of the District Court of the United States for the Northern District of Georgia dismissing a petition for a writ of habeas corpus. The Supreme Court of the United States reversed. In reversing the decisions of the lower Courts, the Supreme Court said:

> "The Sixth Amendment guarantees that 'In all criminal prosecutions, the accused shall enjoy

the right . . . to have the assistance of counsel for his defense.' This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. Omitted from the Constitution as originally adopted, provisions of this and other Amendments were submitted by the first Congress convened under that Constitution as essential barriers against arbitrary or unjust deprivation of human rights. The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned Counsel. That which is simple, orderly and necessary to the lawyer—to the untrained layman—may appear intricate, complex and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to '. . . the humane policy of the modern criminal law . . .' which now provides that a defendant '. . . if he be poor, . . . may have Counsel furnished him by the state . . . not infrequently . . . more able than the attorney for the state.'

"The '. . . right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He

is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.' The Sixth Amendment withholds from Federal Courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of Counsel.

"There is insistence here that petitioner waived this constitutional right. The District Court did not so find. It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to Counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

. . .

"The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without Counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused

may waive the right to Counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.

. . .

"Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of Counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a Federal Court's authority to deprive an accused of life or liberty. When this right is properly waived, the assistance of Counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by Counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A Court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court—as the Sixth Amendment required—by providing Counsel for an accused who is unable to obtain Counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.

. . .

"The cause is reversed and remanded to the District Court for action in harmony with this opinion."

Johnson v. Zerbst, supra, was followed in the case of *Adams v. United States,* 317 U. S. 269, 63 S. Ct. 236, 87 L. Ed. 268, 143 A. L. R. 435. In that decision, the Supreme Court said:

> "The short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the Court, may waive trial by jury, and so likewise may he competently and intelligently waive his constitutional right to assistance of Counsel."

Other cases following the rule set forth in *Johnson v. Zerbst,* supra, are:

Humphries v. United States, 68 A. 2d 803;
Zahn v. Hudspeth, 102 F. 2d 759;
Hall v. Johnston, 103 F. 2d 901;
Sanders v. United States, 205 F. 2d 399.

The Court as has been pointed out in the case of *Johnson v. Zerbst,* supra, stated:

> "While an accused may waive the right to Counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

The Court also said in the same case:

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to Counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

The record in the case at bar does not establish that the Trial Court made any determination as to whether or not the appellant competently and intelligently waived his right to counsel (Tr. Vol. I, p. 14, lines 13-20; Vol. V, p. 1270, lines 1-4). At this point in the record, the Trial Court demonstrates that it recognized its duty to determine whether or not an accused is capable of defending himself and asked the appellant whether or not he proposed to take the position that he was not competent to defend himself. The appellant answered that he felt he was competent to defend himself. However, the Trial Court made no determination on this vitally important point and as the record amply demonstrates, the appellant was not competent to defend himself. It is respectfully submitted that appellant did not competently and intelligently waive his right to counsel and the trial in the Court below was therefore a nullity.

II

APPELLANT ACTING AS HIS OWN COUNSEL THROUGHOUT THE PRE-TRIAL AND TRIAL OF THIS CASE IN THE COURT BELOW WAS NOT CAPABLE OF CONDUCTING HIS DEFENSE AND THE RECORD OF THE PROCEEDINGS IN THE COURT BELOW ESTABLISHES THAT APPELLANT WAS SO IGNORANT OF LAW AND PROCEDURE AND HIS DEFENSE WAS SO INADEQUATE AND INCOMPETENT THAT HE HAS BEEN DEPRIVED OF HIS LIBERTY IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Trial Court failed in its duty to appellant appearing without counsel to see that the essential rights

of appellant were preserved by appropriate intervention when it became apparent during the trial that appellant was incapable of conducting his defense.

The *Sixth Amendment to the Constitution of the United States* provides:

> "*Rights of accused in criminal prosecutions.* In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

The entire record of the trial of this matter in the Court below establishes that the appellant did not have the slightest conception of how to protect his rights in a criminal proceeding. Appellant did not register twenty objections during the entire four-week trial. Appellant had no idea how to conduct a cross-examination of an adverse witness. Appellant informed the Trial Court of this while conducting his cross-examination of Harold S. Chisholm (appellee's witness) (Tr. Vol. III, p. 798). The Trial Court at that point, in the presence of the jury, stated (Tr. Vol. III, p. 799, lines 4-10):

> "The Court. I don't propose to have you impose on the jury by standing there hour after hour indicating how stupid you are or at what a loss you are at defending your own case. You

had the right to have counsel. Now, you chose not to have. Having chosen to represent yourself, you must assume the difficulties and the hazards, but don't weep. It was a voluntary choice on your part."

During the appellant's attempted cross-examination of Mr. Martin Hoffenblum (appellee's witness), the Court stated in the presence of the jury (Tr. Vol. V, p. 1384, lines 5-10):

"Mr. Redfield. I am simply trying to bring out the complete and true facts.

The Court. You do it according to the rules of procedure and evidence. Just because you want to be your own attorney, that doesn't mean that the bars of procedure are down and you can conduct this like you would a Piute powwow."

The instructions that appellant offered in the Court below were wholly inadequate and the appellant did not object to instructions offered by the appellee. Appellant offered to stipulate any evidence into the record that the appellee wished to put in and made no attempt to object to any documentary evidence other than a couple of feeble objections concerning material on years outside of the years covered by the indictment. Even after having made these objections, appellant stipulated the objectionable material in evidence. The total trial record indicates that appellant did not register any objections to the introduction of proof on the part of the appellee. The appellant offered to stipulate

"anything in the way of evidence that they have for the years under which I am indicted, and I

have no objection to the introduction of anything whatever." (Tr. Vol. II, p. 313, lines 4-7.)

This offer to stipulate was rejected but the record indicates that appellant carried out the tenor of the stipulation by failing to object to anything the appellee offered encompassed within the years included in his indictment.

Lunce v. Overlade, C. A. 7 (1957), 244 F. 2d 108; 74 A. L. R. 2d 1384.

In this case Lunce petitioned the United States District Court for the District of Indiana for a writ of habeas corpus alleging that petitioners had been illegally convicted of robbery in a State Court. Petitioners were defended in the Indiana Court by an Ohio lawyer who was so ignorant of Indiana law and procedure as to render it virtually impossible for him to protect the petitioners' right. The District Court dismissed the petition for a writ of habeas corpus and petitioners appealed. The Circuit Court of Appeals for the Seventh Circuit reversed and held that if the petitioners established by adequate and competent proof the pertinent allegations contained in their petitions, they would show that their conviction was so lacking in fundamental fairness as to be in violation of their rights under the *Fourteenth Amendment to the United States Constitution.* In reversing, the Circuit Court through Judge Swaim said:

". . . However, where the representation of an accused by his counsel is so lacking in diligence and competence that the accused is without representation and the trial is reduced to a sham,

it is the duty of the state to see that the essential rights of the accused are preserved by appropriate intervention. United States ex rel. Darcy v. Handy, supra; United States ex rel. Feeley v. Ragen, 7 Cir. 166 F. 2d 976. In the instant case the incompetence of the defense was so apparent as to call for intervention by the officers of the state but nothing was done. We need not consider whether the state would have been required to appoint counsel for petitioners on the facts alleged, for our concern here is the state's deprivation of petitioners' rights under the Fourteenth Amendment by denying them that fundamental fairness without which no conviction can stand.

"This court in United States ex rel. Feeley v. Ragen, supra, at 981, said:

" 'Petitions challenging the competency of counsel, especially years after the conviction, must clearly allege such a factual situation which if established by competent evidence would show the representation of counsel was such as to reduce the trial to a farce or a sham. Otherwise, they should be dismissed.' "

It is respectfully submitted that the record in the case at bar clearly establishes that the appellant, representing himself in this matter in the Trial Court, was represented by counsel so lacking in diligence and competency that he was without representation and the trial was reduced to a sham. Two observations by the Trial Court in this regard during the course of the trial in the presence of the jury, which have been quoted above, clearly establish that the trial was reduced to a sham. The Court compared appellant's

conduct of his defense to a "Piute powwow" (Tr. Vol. V, p. 1384, lines 5-10) in one instance, and in the other instance, the Court observed, also in the presence of the jury, that it would not have the appellant imposing on the jury by standing there hour after hour indicating how stupid he was, or at what a loss he was at defending his own case (Tr. Vol. III, p. 799, lines 4-10).

In a recent case decided by the United States Court of Appeals for the First Circuit February 2, 1961, *In the Matter of the United States of America,* Petitioner, 286 F. 2d 556, the First Circuit through Mr. Justice Woodbury in reversing the Trial Court for granting a judgment of acquittal made some very important observations concerning the conduct of a Trial Judge. The Court, at page 561, said:

> "It may well be that solicitude for the essential rights of an accused require the trial judge to cross-examine government witnesses when an accused with no capacity to protect his rights insists upon conducting his own defense or when an accused is represented by wholly inadequate counsel."

The First Circuit recognizes the duty of a Trial Judge to protect the basic rights of an accused who insists upon conducting his own defense. The record in the case at bar clearly establishes that the Trial Judge in the Court below rather than assisting the appellant in order to preserve his fundamental rights went to the other extreme and constantly berated and harassed the appellant by caustic remarks from the bench,

which would belittle the appellant and his defense in the eyes of the jury. The Court went on to say *In Re United States,* supra:

> "We recognize that in the federal courts the trial judge is not relegated to the position of a mere moderator. He has the duty not only to make rulings of law but also to govern the trial to assure its proper conduct. Quercia v. United States, 1933, 289 U. S. 466, 469, 53 S. Ct. 698, 289 L. Ed. 1321. *Moreover upon his shoulders rests the duty to see that the trial is conducted with solicitude for the basic and essential rights of the accused.* Glasser v. United States, 1942, 315 U. S. 60, 71, 62 S. Ct. 457, 86 L. Ed. 680. But when the trial judge assumes the role of counsel the adversary system breaks down into confusion worse confounded as the record in this case clearly shows." (Emphasis supplied.)

It is therefore respectfully submitted that the Trial Court failed in its duty to appellant appearing without counsel to see that the essential rights of appellant were preserved by appropriate intervention when it became apparent during the trial that appellant was incapable of conducting his defense.

III

APPELLANT WAS DENIED AN IMPARTIAL TRIAL BY VIRTUE OF THE PREJUDICIAL NATURE OF THE TRIAL JUDGE'S TREATMENT OF APPELLANT IN THE PRESENCE OF THE JURY THROUGHOUT THE TRIAL.

United States v. Ah Kee Eng, 241 F. 2d 157, 62 A. L. R. 2d 159.

This case involved the trial of defendant for conspiring with two other individuals to import and sell heroin. The verdict of conviction was reversed and the case remanded for further proceeding by the United States Circuit Court of Appeals for the Second Circuit. In an opinion by Judge Lumbard, the Circuit Court found, among other things, reversible error in the conduct of the Trial Judge. The Court said:

> "There is a third ground of error which also requires reversal, namely the prejudicial nature of the trial judge's treatment of defense counsel and the defense throughout the trial. Thus at numerous pages of the printed appendix the judge exhibited an attitude of impatience, and an annoyance at proper objections and interruptions as if they were captious, absurd or unnecessary. And occasionally the judge made gratuitous comments disparaging the defense counsel and the defense. See particularly pages 14, 18, 31, 37, 45, 47, 53, 67, 71, 78, 79, 89, 106, 116, 122, 124, 126, 134, 137, 140, 148, 155, 162, 192, 242, 266 and 267."

The Appellate Court in the above case, commenting on the prejudicial nature of the Trial Judge's treatment of the defendant's counsel, went on to say:

"While an appellate court should be loath to read too much into the cold black and white of a printed record, it cannot disregard numerous remarks from the bench of a nature to belittle and humiliate counsel in the eyes of the jury. Especially is this so where many of counsel's objections must be repeated in order properly to protect his client because he believes in good faith that the judge has ruled erroneously.

"While the trial judge should be permitted considerable latitude in dealing with counsel, ruling on objections, and keeping the trial moving, he must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceedings. Thus repeated indications of impatience and displeasure of such nature to indicate that the judge thinks little of counsel's intelligence and what he is doing are most damaging to a fair presentation of the defense. A less experienced advocate might well have trimmed his sails to such a judicial wind as prevailed in the courtroom during this trial, and thus have jeopardized the rights and the proper interests of a defendant on trial for a serious felony. Fortunately for this defendant his counsel continued to object when he thought he should and, as we have shown, events proved the wisdom and propriety of his course. Here the Court overstepped the proper bounds and, by what was said and implied before the jury, seriously prejudiced the defendant's case in the eyes of the jury.

"In view of our conclusion that there must be a reversal of the judgment for each of the three errors which we have considered, we believe it unnecessary to discuss the many other errors complained of."

In the case at bar, the conduct of the Trial Judge in his treatment of the appellant would necessarily be more impressive on the jury than in the normal case because counsel for the appellant and appellant were one and the same. As Judge Lumbard stated in the *Ah Kee Eng,* supra, case:

> "While the trial judge should be permitted considerable latitude in dealing with counsel, ruling on objections, and keeping the trial moving, he must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceedings."

The entire record of the trial in this matter clearly indicates that the appellant was deprived of a fair and impartial trial by virtue of the Judge's prejudicial treatment of the appellant. The Trial Judge commenced interrupting and belittling appellant in the first sentence of appellant's opening statement to the jury and continued this course of conduct through the final sentence of appellant's closing argument. It is important to note that the appellant was continuously interrupted and belittled by the Trial Judge during the entire trial of this cause, while counsel for appellee on the other hand, were accorded every courtesy and consideration by the Court. The record bears out that repeatedly during the course of the trial, appellant was chastised by the Court in the presence of the jury, and on various occasions in the presense of the jury, the Court threatened to cite appellant for contempt remarking the only reason that he hadn't done so was because the appellant was

not an attorney (Tr. Vol. III, p. 798, lines 18-25; p. 799, lines 1-10; Vol. V, p. 1380, lines 1-2). Throughout the course of the trial in this case, the Court constantly stated to appellant that if appellant were an attorney, the Court would hold him in contempt, or that if appellant were an attorney, the Court would throw him out of Court, or if appellant were an attorney, he would have been severely censored (Tr. Vol. VI, p. 1612, lines 6-18). In one instance, the Court in the presence of the jury stated to appellant that the next time he disregarded the order of the Court and made improper comments, the Court would hold the appellant guilty of contempt and give him about ten days in the federal prison in Reno. The Court at this point again stated that if the appellant were an attorney, he would have been doing time the last three weeks and admonished appellant to remember that, all in the presence of the jury (Tr. Vol. VII, p. 1690, lines 22-25; p. 1691, lines 1-19). Shortly after this incident, the Court stated to appellant:

> "The Court. Don't take that as an invitation, Mr. Redfield, because the Court will do what it promised you if you aren't careful. I have reached the end of my patience." (Tr. Vol. VII, p. 1693.) (This, of course, refers to the promise by the Court to put the appellant in prison.)

The Trial Court not only did not criticize or chastise counsel for the appellee during the course of the trial but repeatedly assumed the role of Advocate on behalf of the appellee by interrupting appellant even though no objection had been interposed by two able

and experienced Trial Counsel representing the appellee. This course of conduct on the part of the Judge continued throughout the trial. The record of the trial is replete with examples of the prejudicial conduct on the part of the Trial Judge in this regard. It is respectfully submitted that the following references to the Reporter's Transcript of the Proceedings are examples of the prejudicial conduct of the Court which appellant cites as harmful misconduct on the part of the Court calculated to prejudice appellant's standing before the jury:

Vol. I, p. 145, lines 7-23. The first two sentences of appellant's opening statement.

Vol. III, p. 792, line 25

Vol. III, p. 793, lines 1-16. It is important to note that in this instance, appellee was conducting cross-examination where it is fundamental that the examiner can ask leading questions.

Vol. III, p. 796, lines 6-20

Vol. IV, p. 873, lines 14-16

Vol. IV, p. 875, lines 10-20

Vol. IV, p. 886, lines 3-11. In this instance, Mr. Maxwell interrupted the appellant while he was asking a question. The appellant attempted to explain to Mr. Maxwell what he was attempting to do. The Court interrupted appellant and admonished him for talking while someone else was speaking, though the Court accorded Mr. Maxwell the privilege of talking while the appellant was speaking.

Vol. V, p. 893, lines 8-11

Vol. IV, p. 894, lines 16-25

Vol. IV, p. 895, lines 1-9

Vol. IV, p. 928, lines 2-5

Vol. IV, p. 929, lines 1-2

Vol. IV, p. 930, lines 4-23

Vol. IV, p. 1112, lines 6-25

Vol. V, p. 1128, lines 8-16

Vol. V, p. 1129, lines 2-10

Vol. V, p. 1211, lines 11-19

Vol. V, p. 1269, lines 20-25

Vol. V, p. 1281, lines 24-25

Vol. V, p. 1282, lines 1-5; lines 10-20

Vol. V, p. 1286, lines 2-8. In this particular instance, the Court arbitrarily cut appellant off without objection from appellee on a perfectly proper question.

Vol. V, p. 1373, lines 9-17

Vol. V, p. 1379, lines 11-25

Vol. V, p. 1380, lines 1-2

Vol. V, p. 1383, lines 5-9

Vol. V, p. 1386, lines 1-22

Vol. V, p. 1390, lines 8-22

Vol. V, p. 1391, lines 6-15

Vol. VI, p. 1424, lines 12-16

Vol. VI, p. 1559, lines 4-18. The Court here commented that the appellant may take the witness stand.

Vol. VI, p. 1560, lines 17-23

Vol. VI, p. 1562, lines 3-25

Vol. VI, p. 1563, lines 1-20

Vol. VI, p. 1564, lines 2-5, lines 15-24

Vol. VI, p. 1566, lines 18-23

Vol. VI, p. 1567, lines 1-3

Vol. VI, p. 1569, lines 1-4

Vol. VI, p. 1612, lines 3-23. In this instance, the Court chastised the appellant for improperly impeaching a witness for the appellee.

Vol. VI, p. 1614, lines 5-9. In this instance, the Court improperly underwrites the credibility of a witness for the appellee.

Vol. VII, p. 1690, lines 22-25

Vol. VII, p. 1691, lines 1-19

Vol. VII, p. 1693, lines 14-18

Vol. VII, p. 1713, lines 8-16

Vol. VII, p. 1735, lines 10-12

Vol. VII, p. 1751, lines 12-22

Vol. VIII, p. 1973, lines 18-19; pp. 1974, 1975, 1976, 1977, 1978. These references to the Reporter's Transcript of proceedings referred to the appellant's closing argument. At this point, the Court refused to permit the appellant to comment on a burglary of his home though evidence was in the record referring to said burglary (Tr. Vol. IV, p. 1027, lines 14-16; Vol. V, p. 1365, lines 18-21). This evidence was presented by witnesses for the appellee and it was

certainly prejudicial error for the Court to refuse to permit the appellant to make reference to the burglary of his home.

Vol. VIII, p. 2002, lines 2-21. Again, the Court refused to permit appellant to refer to the burglary of his home which, as has been pointed out, had been commented on by appellee's witnesses.

Vol. VIII, p. 2014, lines 15-24

Vol. VIII, p. 2016, lines 16-25

Vol. VIII, p. 2017, lines 1-10

Vol. VIII, p. 2020, lines 15-18

Vol. VIII, p. 2021, lines 19-25

Vol. VIII, p. 2026, lines 16-17. This was the closing sentence of appellant's argument, his only opportunity to argue to the jury. The Court interrupted the closing sentence of his closing argument with no objection from either Mr. Maxwell or Mr. Babcock.

It is respectfully submitted that the foregoing references to the Reporter's Transcript of the Proceedings when viewed in the light of the decision in the *Ah Kee Eng,* supra, case establish that the appellant was denied an impartial trial by virtue of the prejudicial nature of the Trial Judge's treatment of the appellant as appellant's counsel.

Another basis which appellant urges as establishing that he was denied a fair and impartial trial is the closing argument of Mr. Babcock on the part of the appellee. This argument appears at Tr. Vol. VIII, p. 2026B, lines 24-25; p. 2027, lines 1-5. Mr. Babcock's argument was certainly intended to inflame the

jury against the appellant, particularly in view of the fact that the appellant had been repeatedly interrupted and admonished by the Trial Court throughout the scope of his argument.

Appellant respectfully submits that he was further denied his constitutional right to a fair and impartial trial by jury by virtue of the fact that the Court erred in giving the jury the additional instruction, which instruction was given by the Court after the jury had commenced its deliberations. In this regard, it is important to note that the jury retired for their deliberations at the hour of 4:42 o'clock p.m. on October 27, 1960. At 12:45 o'clock a.m. on the 28th day of October, 1960, Court was convened and the Court stated that it had received a message from the foreman requesting certain evidence (Tr. Vol. VIII, p. 2088). Following the request for this evidence, at 12:58 o'clock a.m., the Court received another message from the jury that they wished to adjourn for the evening and reconvene the following morning, and at 1:12 o'clock a.m. the jury was retired for the evening (Tr. Vol. VIII, p. 2094). At 10:00 o'clock a.m. on Friday, October 28, 1960, Court was reconvened with the jury present. The Court reviewed the various requests with the jury and stated in addition that

> "at this time the Court will give to the jury one additional instruction:" (Tr. Vol. VIII, p. 2102, lines 24-25)

and the following instruction was given:

> "Ladies and gentlemen of the jury, this is an important case. In all probability it cannot be tried better or more exhaustively than it has

been on either side. It is desirable that you agree upon a verdict. The Court does not want any juror to surrender his or her conscientious convictions. Each juror should perform his or her duty conscientiously and honestly according to the law and the evidence. Although the verdict to which a juror agrees, of course, must be his or her own verdict, the result of his or her own convictions and not a mere acquiescence in the conclusions of other jurors, yet in order to bring twelve minds to a unanimous result you must examine the question submitted to you with candor and with a proper regard and deference to the opinions of each other.

"You should consider that the case at some time must be decided and that you were selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to a jury more intelligent, more impartial or more competent to decide it, or that more or clearer evidence will be produced on one side or the other.

"In conferring together, you ought to pay proper respect to each other's opinions, with a disposition to be convinced by each other's arguments. On the one hand, if much the larger number of your panel are for conviction, a dissenting juror should consider whether a doubt in his or her own mind is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent with himself, who have heard the same evidence with the same attention, with an equal desire to arrive at the truth and under the sanctity of the same oath;

and, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and to distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their co-jurors.

"In so stating, the Court again emphasizes that no juror should surrender his or her conscientious convictions and a verdict arrived at and to which a juror agrees must be his or her own verdict, the result of his or her own convictions, and not a mere acquiescence in the conclusions of other jurors."

This instruction was erroneous in that it did not include any explanation of burden of proof on the part of appellee.

United States v. Allen, 186 F. 2d 439, 194 F. 2d 1.

In the *Allen* case, a similar instruction was given by the Court. However, the instruction in the *Allen* case contained this very important additional language which was not included in the instruction given by the Trial Court in the case at bar:

"In the present case the burden of proof—the burden is upon the Government to establish the guilt of the defendants beyond a reasonable doubt, and if you are left in doubt as to the guilt of the defendants, or any of them, such defendant or defendants is entitled to the benefit of that doubt and must be acquitted; . . ."

The Court's attention is respectfully directed to the case of *Billeci v. United States,* 87 App. D.C. 274, 184 F. 2d 394, 24 A.L.R. 2d 881 in connection with this instruction. In the *Billeci* case, the trial involving violation of a District of Columbia statute concerning lotteries lasted several days. The jury retired for deliberations at about noon on January 25; thereafter, at 5:18 p.m., the Court called the jury to the box and inquired as to their progress. At 9 o'clock p.m., the Court again called the jury to the box and inquired as to progress and at this point gave the jury the so-called Allen charge. Quoting from the decision of Circuit Judge Prettyman, commencing at page 890, 24 A.L.R. 2d, Headnote 8:

> "We return now to the first of the two instructions to which we have referred. This was given when the foreman advised the court that it was impossible for the jury to reach a verdict. The court said, in part:
>
> " 'Ladies and gentlemen of the jury, I am not convinced that it is impossible for you to reach a verdict. It may seem so, perhaps. But you must make additional endeavors. . . . If you believe from the testimony that the defendants have committed the crime of which they are charged, then you must find a verdict of guilty, irrespective of whether the witnesses appealed to you or not. On the other hand, if you do not believe that the defendants have committed the crime of which they are charged, then you must find a verdict of not guilty.
>
> " 'You must confine yourselves strictly to the question and ask yourself honestly, "Do I believe

> from the evidence I have heard at this trial that the defendants have committed this crime?" If you answer the question "Yes," you must find the defendants guilty. If your answer is "No," then you must find them not guilty. . . .' *That statement is not the law. The law is that if the jury believes beyond a reasonable doubt that the defendant has committed the alleged offense it should find a verdict of guilty, but if there be a reasonable doubt in the minds of the jurors they must acquit. The instruction given was error.*" (Emphasis supplied.)

Judge Prettyman then went on to make some very important observations concerning the rules governing a Federal Trial Judge. Quoting from the opinion of Judge Prettyman, commencing at page 893, 24 A.L.R. 2d, Headnote 14:

> "Since these cases must go back for new trial several features of the present record require us to state again the rule governing a federal trial judge in commenting upon evidence. It has been stated many times by many courts and many judges. This court stated it in Smith v. United States, again in Vinci v. United States, supra, and more recently in Sullivan v. United States.
>
> "A federal trial judge in a criminal case is not an inert figure. He is not a mere moderator. Besides his own exclusive functions of conducting the trial and declaring the applicable law, he may guide and assist the jury in its consideration of the evidence. The purpose of his comment is to aid, through his experience, the inexperienced laymen in the box in finding the truth in the confusing conflicts of contradictory evidence. In ex-

ceptional cases he may even express his opinion upon the evidence, or phases of it. But there is a constitutional line across which he cannot go. The accused has a right to a trial by the jury. That means that his guilt or innocence must be decided by twelve laymen and not by the one judge. A judge cannot impinge upon that right any more than he can destroy it. We cannot press upon the jury the weight of his influence any more than he can eliminate the jury altogether. It is for this reason that courts have held time and again that a trial judge cannot be argumentative in his comments; he cannot be an advocate; he cannot urge his own view of the guilt or innocence of the accused. Of course he may direct judgment of acquittal under proper circumstances.

"Moreover, other indestructible principles of our criminal law are pertinent to the comment of a judge upon the evidence. An accused is presumed to be innocent. Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only one of them fixedly has a reasonable doubt, a verdict of guilty cannot be returned. These principles are not pious platitudes recited to placate the shades of venerated legal ancients. They are working rules of law binding upon the court. Startling though the concept is when fully appreciated, those rules mean that the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubts as to guilt, and the unanimous verdict requirement.

"The public interest requires that persons who have committed crimes be convicted of them. But

the responsibility for producing the evidence which will persuade twelve jurors of guilt beyond a reasonable doubt is upon the prosecutor. It is a serious public responsibility, but it is upon the prosecutor and upon him alone. The judge has no part in that task. The prosecutor represents society in the prosecution. The attorney for the defense represents the accused. The judge is a disinterested and objective participant in the proceeding. 'Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge.'

"The difference between assisting the jury, which is a duty of a federal judge, and encroaching upon its responsibilities, which is forbidden, hase been developed at great length many times, as we have pointed out. When a federal judge comments upon evidence by expressing his opinion upon phases of it, he is treading close to the line which divides proper judicial action from the field which is exclusively the jury's. Therefore he must make it unequivocally clear to the jurors that conclusions upon such matters are theirs, not his, to make; and he must do so in such manner and at such time that the jury will not be left in doubt; references in some remote or obscure portion of a long charge will not suffice for the purpose.

"After a jury has returned a verdict of guilty the defendant is no longer the accused but is the convicted. It is at that point, and not until that point, that punishment becomes a function of the judge.

"It is a serious thing for an appellate court to reverse convictions in criminal cases. But the

> controlling importance is that the law be followed. The rules of law applicable to the function of the judge in a criminal trial by a jury are well settled. No matter what the impulse may be to transgress or evade them under provocative circumstances, they must be observed. This is basic, without exception, and compulsory.
>
> "The judgment of the District Court is reversed."

The language of Judge Prettyman in the *Billeci* case above quoted, when reviewed against the entire record of the trial in the case at bar, establishes that appellant should be granted a new trial in the interests of justice.

The Court's attention is again respectfully called to the case of *In Re United States,* supra, in which the United States Court of Appeals for the First Circuit through Mr. Justice Woodbury stated:

> "It may well be that solicitude for the essential rights of an accused requires the trial judge to cross-examine government witnesses when an accused with no capacity to protect his rights insists upon conducting his own defense or when an accused is represented by wholly inadequate counsel.
>
> . . .
>
> "We recognize that in the federal courts the trial judge is not relegated to the position of a mere moderator. He has the duty not only to make rulings of law but also to govern the trial to assure its proper conduct. Quercia v. United States, 1933, 289 U.S. 466, 469, 53 S. Ct. 698, 289 L. Ed. 1321. Moreover upon his shoulders

rests the duty to see that the trial is conducted with solicitude for the basic and essential rights of the accused. . . ."

The record in the case at bar when viewed in the light of the *United States v. Ah Kee Eng,* supra, *In Re United States,* supra, and the various other authorities cited by appellant in support of this proposition clearly establishes that appellant was denied a fair and impartial trial by virtue of the prejudicial nature of the Trial Judge's treatment of appellant in the presence of the jury throughout the trial.

IV

ATTORNEY FOR APPELLEE DURING HIS CLOSING ARGUMENT APPEALED TO THE PASSION AND PREJUDICE OF THE JURY CONCERNING IRRELEVANT MATTERS, THEREBY INTENDING TO INFLAME THE JURY AGAINST THE APPELLANT.

In his closing argument, the United States Attorney emphasized the attitude of the Trial Judge toward appellant in the eyes of the jury. The closing argument of the United States Attorney is as follows:

"May it please the Court, ladies and gentlemen of the jury:

"I want you to know that I will not give dignity to the remarks of Mr. Redfield by responding to them. I have some fifteen pages of notes taken during the course of those remarks. They will be discarded.

"Ladies and gentlemen, this is a nation of law, not of men. It would appear that this financial

> baron of Mount Rose is above the law. He has shown an arrogant contempt for my office, of this Court, of the United States and its many institutions. I am disgusted and indignant by his conduct here in court today, and for him I must apologize to the Court and to this jury.
>
> "You are called upon to render your verdict on the evidence and the testimony adduced at this trial, nothing else. I ask only one thing, that you do justice to this defendant, that you do justice to the United States." Tr. Vol. VIII, pp. 2026B-2027.

The second paragraph of the United States Attorney's closing argument develops the theme suggested by the Trial Judge against the appellant throughout the course of the trial. The United States Attorney depicts the appellant to the jury as a "financial baron of Mount Rose" above the law, insists to the jury that the appellant has shown an arrogant contempt for the office of the United States Attorney, an arrogant contempt of the Court, and an arrogant contempt of the United States and its institutions. The record certainly does not bear out the argument of the United States Attorney. The United States Attorney proceeded to inform the jury that he was disgusted and indignant by the conduct of the appellant in Court and took the liberty of apologizing to the Court and to the jury for the appellant. Such conduct on the part of the United States Attorney echoes the sentiments of the Trial Judge as expressed in the presence of the jury by the Trial Judge during the course of the trial, and the appellee's closing ar-

gument to the jury would certainly tend to prejudice the jury against the appellant and thereby deprive him of a fair and impartial trial.

In conclusion, the Court's attention is respectfully directed to the case of *Meeks v. United States,* C.A. 9 (1947), 163 F. 2d 598. In the *Meeks* case, the Circuit Court of Appeals for the Ninth Circuit said:

> "Indeed, in view of the fundamental character of these errors we may not affirm, even if we are 'without doubt' of appellant's guilt." (Page 602 in the opinion written by Judge Denman of the Circuit Court of Appeals for the Ninth Circuit. The language which is here emphasized by underscoring appears in italics.)

The Circuit Court in the *Meeks* case, cited *Bellenbach v. United States,* 326 U.S. 607, 66 S. Ct. 402, 90 L. Ed. 350. In the *Bellenbach* case, the Supreme Court of the United States, through Mr. Justice Frankfurter, stated:

> "From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." (Underscoring appears in italics.)

In view of the foregoing, it is respectfully submitted that the appellant did not receive that fair and impartial trial to which every accused is entitled under the Constitution and Laws of the United States of America. Therefore, the judgment of conviction in the Trial Court should be reversed and the case remanded for a new trial.

Dated, Reno, Nevada,
May 11, 1961.

Respectfully submitted,
GRUBIC, DRENDEL & BRADLEY,
By WILLIAM O. BRADLEY,
Attorneys for Appellant.

No. 17,317

IN THE

United States Court of Appeals

For the Ninth Circuit

LaVere Redfield,
Appellant,

vs.

United States of America,
Appellee.

On Appeal from the United States District Court for the District of Nevada

BRIEF FOR THE APPELLEE

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District of Nevada

Clyde R. Maxwell, Jr.
Assistant Regional Counsel
Internal Revenue Service

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BRIEF FOR THE APPELLEE

JURISDICTION

The jurisdiction of the United States District Court was invoked under 26 U.S.C. (1939 ed.), Sec. 145(b), 26 U.S.C. (1954 ed.), Sec. 7201, and 18 U.S.C., Sec. 3231. The jurisdiction of this Court rests upon 28 U.S.C., Secs. 1291 and 1294.

QUESTIONS PRESENTED

1. Did appellant waive his right to counsel?

2. Was the waiver of counsel competently and intelligently made?

3. Did the trial court determine prior to trial that appellant's waiver of counsel was competently and intelligently made?

4. Was the appellant denied his rights under the Sixth Amendment to the Constitution of the United States and/or the right to a fair trial because he lacked the skill of a lawyer in acting as his own counsel?

5. Did certain remarks of the court to appellant constitute prejudicial error?

6. Did the closing argument of the United States Attorney constitute prejudicial error?

7. Was the supplemental instruction erroneous?

STATUTES, RULES, AND CONSTITUTIONAL AMENDMENT INVOLVED

Title 26 (1939 ed.) Sec. 145(b), United States Code (Int. Rev. Code of 1939):

* * * * * * *

> (b) Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Title 26 (1954 ed.), Sec. 7201, United States Code (Int. Rev. Code of 1954):

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Federal Rules of Criminal Procedure:

> Rule 30. Instructions. * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.
>
> Rule 52(a). Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

LaVere Redfield, the appellant, is 63 years of age and married to Nell Jones Redfield. He has no children. A former California resident, appellant moved to Reno, Nevada, in 1935. Since that time he has become well known in the Reno community as an astute multimillionaire. He holds vast areas of real estate in Washoe County, Nevada; he deals extensively in the stock market; and he operates a Reno lumber yard.

On May 26, 1960, appellant was indicted for income tax evasion for the years 1953 to 1956, inclusive. (R. pp. 2-7.) He waived his right to counsel.

At the close of a four week trial, the government had shown, through the medium of 469 documentary exhibits and the testimony of 90 witnesses, that the appellant had failed to report substantial amounts of dividends, interest, and gains on the sale of securities which he had received in his own name, in the maiden name of his wife, N.[ell] R. Jones, and in the names of some ten nominees, all of whom were friends, business associates, or relatives of appellant, some of whom were deceased. It was also shown that appellant understated his gain on the sales of securities which he did report on the income tax returns of himself and his wife. The unreported and understated income was proved, specific item by specific item, and no hypothetical method of proof, such as a net worth computation, was used.

Willful intent to evade taxes was evidenced not only by the extraordinarily large amounts of income not

reported, but, among other things, by appellant's failure to give the specific sources of his income upon his income tax returns; by the fact that appellant did not report one cent of the income which he received in the names of his nominees, who testified that they did not know of or made no claim to these profits; by the testimony of one borrower that appellant required her to pay him interest in cash so that he would not have to report it on his income tax returns; and by the over-statement of the cost of securities sold on his returns, although the purchases and sale of certain of these securities had taken place wholly within one of the tax years involved.

Amounts of income reported and unreported on the separate returns of the appellant and his wife for each of the three years for which appellant was convicted were shown by the government to be as follows:

1953	Income Reported	Unreported Income
INCOME:		
Dividends	$ 89,940.34	$ 5,419.96
Interest	–0–	15.00
Rent	–0–	1,000.00
Capital Gains (Net)	–0–	14,306.96
Adjusted Gross Income	$ 89,940.34	$ 20,741.92
Deductions	17,724.36	
Net Income	$ 72,215.98	$ 20,741.92

1954

	Income Reported	Unreported Income
INCOME:		
Dividends	$ 67,952.46	$ 11,292.92
Interest	25,579.56	91.52
Capital Gains (Net)		
Short Term	–0–	91,302.36
Long Term	314,983.94	156,073.62
Rent	1,000.00	–0–
Adjusted Gross Income	$409,515.96	$258,720.42
Deductions	34,818.72	
Net Income	$374,697.24	$258,720.42

1955

	Income Reported	Unreported Income
INCOME:		
Dividends	$ 60,325.26	
Interest	–0–	$ 5,114.82
Capital Gains (Net)		
Short Term	–0–	123,888.86
Long Term	102,513.68	159,346.14
Rent	500.00	–0–
Adjusted Gross Income	$163,838.94	$294,431.42
Deductions	14,485.36	
Net Income	$149,353.58	$294,431.42

INCOME TAX

	Reported	Evaded
1953	$ 36,802.88	$ 10,579.72
1954	183,004.22	149,609.32
1955	68,984.44	175,900.54
	$288,791.54	$336,089.58

Appellant did not take the stand in his own defense, but contented himself throughout the trial with attempting to testify improperly at odd moments as he believed opportune, and in his final argument. These attempts to get his unsworn testimony, not subject to cross-examination, before the jury led to many cautionary remarks by the trial judge to appellant, as did the cavalier and contemptuous manner that appellant adopted toward the entire proceedings and the trial judge in particular.

Though appellant had admitted in the pre-trial proceedings that he had records of his financial transactions (Tr., Vol. I, p. 24), he did not introduce them in evidence, or purport to make any substantive defense to the charges. He contented himself primarily, with the introduction of character evidence.

On October 28, 1960, the jury found appellant guilty on six counts (those relating to the tax years 1953, 1954 and 1955), and not guilty on two counts (relating to the year 1956). (R. p. 28.)

Motion for new trial was filed by appellant on November 3, 1960. (R. p. 30.)

On November 10, 1960, appellant was sentenced to serve a term of five years on each of six counts, to run concurrently, fined in the sum of $10,000 on each of six counts, a total fine of $60,000, and assessed the costs of prosecution. (R. p. 33.)

On March 23, 1961, the trial court entered its order denying appellant's motion for new trial. (R. pp. 123-179.)

Notice of appeal was filed on March 27, 1961 (R. p. 180).

SUMMARY OF ARGUMENT

Appellant waived his right to counsel.

Appellant's waiver of counsel was competently and intelligently made.

The trial court determined prior to trial that appellant's waiver of counsel was competently and intelligently made.

Appellant was not denied his rights under the Sixth Amendment to the Constitution of the United States and/or a fair trial because he lacked the skill of a lawyer in acting as his own counsel.

The remarks of the court to appellant during trial were not prejudicial.

Closing argument of the United States Attorney was not prejudicial.

There was no error in the supplemental instruction as given by the Court.

ARGUMENT

I.

GENERAL STATEMENT OF THE POSITION OF THE UNITED STATES

This appeal presents several questions, essentially going to the adequacy and fairness of the proceedings below. Although, to be sure, the appellant was entitled

to a fair trial, it is settled that he is not necessarily entitled to a perfect one. *Lutwak v. United States,* 344 U.S. 604, 619 (1953). Accordingly, we would begin the presentation of the appellee's argument by referring to the well expressed thought of Mr. Justice Frankfurter in his concurring opinion in the case of *Johnson v. United States,* 318 U.S. 189, 202 (1943):

> "In reviewing criminal cases, it is particularly important for appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal appeal into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution."

Similarly, we would note the command of Rule 52(a), Federal Rules of Criminal Procedure, that: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." This, of course, is but another way of saying that appellant must show that the error, if any, was prejudicial to him. The burden of showing prejudicial error is on the appellant, *United States ex rel. Darcy v. Handy,* 351 U.S. 454, 462 (1956); *Myres v. United States,* 174 F.2d 329, 332 (8 Cir. 1949), cert. den. 338 U.S. 849 (1950), and his burden must be sustained "not as a matter of speculation, but as a demonstrable reality". *United States ex rel. Darcy v. Handy, supra,* at 462.

Bearing these thoughts in mind, we have, for the convenience of this court, summarized the nature of the evidence in our "Statement of the Case". We

deem it unnecessary further to elaborate on the proposition that the evidence presented by the appellee, to which appellant presented virtually no defense, showed appellant's guilt well beyond a reasonable doubt. In other words, appellee respectfully contends that appellant's assignments of error should be considered in light of the overwhelming evidence of his guilt of the charges for which he was convicted.

We quite agree, as was stated in *Meeks v. United States,* 163 F.2d 598 (9 Cir. 1947), that where the errors are "fundamental", there may not be an affirmance, even if the appellate court is "without doubt" of appellant's guilt; but, that is not to say that the magnitude of the evidence is irrelevant when we are considering the presumed impact of the error. In short, we believe that the best expression of the rule is contained in the opinion of the Court of Appeals for the Eighth Circuit in the case of *Homan v. United States,* 279 F.2d 767, 771 (8 Cir. 1960), cert. den. 364 U.S. 866 (1960):

> "Errors of the trial which may be prejudicial in a close criminal case in the sense of being capable in such a situation, of possibly affecting the result, can well be without any such rational possibility in a strong case, and thus not entitle the defendant to a reversal of his conviction."

See also *United States v. Sheba Bracelets, Inc.,* 248 F.2d 134, 145 (2 Cir. 1957), cert. den. 355 U.S. 904 (1957); *United States v. Spadafora,* 181 F.2d 957, 959 (7 Cir. 1950), cert. den. 340 U.S. 897 (1950); *Ippolito v. United States,* 108 F.2d 668, 671 (6 Cir.

1940); *Fitter v. United States,* 258 Fed. 567, 573 (2 Cir. 1919); *Solenson v. United States,* 215 Fed. 679, 685 (7 Cir. 1914); *Compare Berger v. United States,* 295 U.S. 78, 89 (1935); *United States v. Carmel,* 267 F.2d 345, 347 (7 Cir. 1959).

Each of the issues raised on this appeal was raised by appellant below on his motion for new trial. (R. pp. 30-32, 37-76), and each of such issues was considered, fully answered, and denied substance, by the trial court in its order denying motion for new trial. No good purpose would be served by reiterating the legal or factual position of the trial court, a position which we believe is supported not only by the record in this case, but by the citation or relevant case authority. Accordingly, appellee has adopted that order and invites this court's attention to the matters therein contained. (R. pp. 123-179; App. p. 1-57.)

The appellant can only be assumed to recognize that the order denying motion for new trial is part of the record here. Despite this knowledge, he has failed in his brief to point out in any way whatsoever, why the findings of fact contained in that order were erroneous. We suggest that his failure in this respect arises because those findings of fact were, as is amply demonstrated in the order itself, supported by a reasonable interpretation of the overwhelming evidence relevant to the issues raised by the appellant.

Furthermore, we think it to be interesting that appellant has in no way sought to distinguish; explain away, refute, or even refer to the compelling authority relied upon by the trial court in its opinion below.

II.

APPELLANT WAIVED HIS RIGHT TO COUNSEL

On June 16, 1960, appellant was arraigned in open court. The court asked the defendant if he were represented by counsel. He said he was not. He was then advised by the trial court of his right to counsel and asked if he had sufficient funds with which to employ counsel. (Tr. Vol. I, p. 4.) He responded affirmatively. On the opening day of the trial, some three and a half months later, appellant confirmed his waiver of counsel. (Tr. Vol. I, pp. 39-40.)

In the order denying motion for new trial, the trial court found as a fact that appellant waived his right to counsel (R. pp. 126-127; App. pp. 4-5), and it is respectfully submitted that this finding is supported by the record.

III.

APPELLANT'S WAIVER OF COUNSEL WAS COMPETENTLY AND INTELLIGENTLY MADE

This very issue has been treated at length by the trial court in its order denying motion for new trial. (R. pp. 130-143; App. pp. 8-21.) After a careful and exhaustive examination of the record and the applicable law, it concluded:

> "Upon a consideration of all of the evidence—the psychiatric report, the statements and conduct of [appellant], his past experiences, both in and out of court, and his demeanor—this court finds that [appellant] has not met the burden of proof which the above cited cases place upon him. Ac-

> cordingly, we find as fact, *Michner v. Johnston,* 141 F.2d 171, 175 (9th Cir., 1944), that [appellant] waived his right to counsel in a competent, intelligent and understanding manner." (R. p. 143; App. p. 21.)

It will be noted, in passing, that appellant's argument on this point, at pages 8 to 14 in his brief, consists of advertence to a number of cases, with primary reliance upon what this court in *Cooke v. Swope,* 109 F. 2d 955 (9 Cir. 1940), has termed the "much misread" opinion in *Johnson v. Zerbst,* 305 U.S. 458 (1938). He quoted propositions of law from that opinion with which the appellee has no quarrel. But, he makes no effort to integrate the facts of the instant case with the points of law which he raises.

It is submitted that appellant's waiver of counsel was competently and intelligently made.

IV.

THE TRIAL COURT DETERMINED PRIOR TO TRIAL THAT APPELLANT'S WAIVER OF COUNSEL WAS COMPETENTLY AND INTELLIGENTLY MADE

Apparently it is appellant's contention that the trial court failed to make a determination that appellant was capable of competently and intelligently waiving his right to counsel. Also, in several places in his brief, he expresses this as a failure to determine "*on the record*" that appellant had such capability.

In the order denying motion for new trial, the trial court found as fact that it did determine for itself

that appellant's waiver of counsel was competently and intelligently made:

> "Although a formal determination of record was not made at the time defendant waived his right [to counsel], the court had an adequate opportunity to discuss the matter with defendant both on and off the record, and *did determine* for itself that defendant's choice to appear pro se was made with his 'eyes open.' " (R. p. 130, App. p. 8.) (Emphasis supplied.)

As the trial court points out, there was nothing in the proceedings before trial to indicate that appellant was not capable of competently and intelligently waiving his right to counsel, so that, as in the legion of other cases where a defendant waives his right to counsel, no express determination of this fact for the record appeared necessary. This Court has unequivocally held that, even in light of the dictum in *Johnson v. Zerbst, supra,* an express determination of record is not mandatory. *Widmer v. Johnston,* 136 F.2d 416, 418 (9 Cir. 1943) cert. den. 320 U.S. 780 (1943).

In any event, the fact is plain, although appellant does not refer to it, that the trial court is on record that a determination of appellant's competency was made at the time he waived counsel. In the order below, the factors leading the trial court to this conclusion prior to trial are clearly set out, and appellee respectfully refers this Court to that order. (R. pp. 130-134; App. pp. 8-12.)

V.

APPELLANT WAS NOT DENIED HIS RIGHTS UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND/OR A FAIR TRIAL BECAUSE HE LACKED THE SKILL OF A LAWYER IN ACTING AS HIS OWN COUNSEL

Once again this Court is respectfully referred to the order denying motion for new trial (R. pp. 143-150; App. pp. 21-28), wherein the trial court considered this issue at some length, and referred to many facts and matters contained in the record as well as the pertinent case law.

In his brief, appellant contends that the trial court should have assumed the role of advocate on behalf of appellant when it became clear that appellant was not familiar with the niceties of criminal procedure. Yet, the inconsistency of his position is clear from the following proposition which he, himself, quotes at page 20 of his brief:

> "... But when the trial judge assumes the role of counsel the adversary system breaks down into confusion worse confounded as the record in this case clearly shows." *In re United States,* 286 F.2d 556, 561 (1 Cir. 1961).

It is also noted that appellant does not point out in his argument which specific right was denied him under the Sixth Amendment. If he contends that it was the right to counsel which he was denied, it is submitted that this right was competently and intelligently waived. Suffice to say that his lack of skill in presenting his case has nothing at all to do with the Sixth Amendment or the concept of a fair trial. *Burstein v. United States,* 178 F.2d 665 (9 Cir. 1949).

VI.

THE REMARKS OF THE COURT TO APPELLANT DURING TRIAL WERE NOT PREJUDICIAL

The appellant has at length cited page references in the reporter's transcript, which references are to remarks of the trial court which he alleges to have been prejudicial in that they denied him a fair trial.

In a most thorough manner, the trial court, in its order denying motion for new trial (R. pp. 150-173; App. pp. 28-51), responded to appellant's contentions point by point. We believe that the trial court's analysis is a correct one in light of the cases cited in the opinion below.

It is important, we think, that appellant, in his brief here, has failed to come to grips with five important propositions expressed by the trial court. They are:

1. That the remarks of the trial court were prompted by, and solely in response to, the contemptuous conduct of the appellant, which existed "almost from the beginning and certainly right up to the end. . . ." (See R. p. 168; App. p. 46, where the trial court also observed that "It is conceivable that [appellant] did not understand the repeated explanations, cautions and reprimands of the court. Yet, time after time after time, he proceeded to ignore the court and to display an utter contempt for it.");

2. That the remarks of the trial court may only properly be evaluated, under the case law, when read in context and in light of the entire record;

3. That the remarks did not convey to the jury the trial judge's personal feelings as to appellant's guilt or innocence. See *Billeci v. United States,* No. 16,992 (9 Cir. May 12, 1961); *United States v. Liss,* 137 F.2d 994, 995 (2 Cir. 1943), cert. den. 320 U.S. 773 (1943);

4. That the court carefully instructed the jury as to the reasons for its admonitions to appellant, and specifically cautioned the jury that it was to draw no inferences therefrom. (Tr. Vol. 8, 2076-2077; R. p. 171; App. p. 49); and

5. That in determining whether the remarks were prejudicial, this Court has announced that: "Merely because a statement is made or question asked by court or counsel in the heat of a spirited trial which subsequently, in the cool ivory tower of appellate court chambers seems inappropriate, does not make the stating nor the asking prejudicial error". *Bush v. United States,* 267 F.2d 483, 488 (9 Cir. 1959), and re-examined with approval in *Billeci v. United States,* No. 16,992 (9 Cir. May 12, 1961).

We suggest that the bald assertions of the appellant are a poor weapon with which to fend with the calm and cogent analysis by the court below. (R. pp. 150-173; App. pp. 28-51.)

Without discussion, explanation or argument, the appellant has merely restated conclusions which the trial court correctly, we believe, found to be lacking in substance.

VII.

CLOSING ARGUMENT OF THE UNITED STATES ATTORNEY WAS NOT PREJUDICIAL

The appellant complains of the closing argument of the United States Attorney. In doing so he fails to recognize three important facts: 1. That the remarks were not objected to at the time they were made (see *Ochoa v. United States,* 167 F.2d 341, 345 (9 Cir. 1948; 2. That the remarks set out in full in the opinion below (R. p. 174; App. p. 52) display nothing improper even as an abstract proposition, because the United States Attorney explained to the jury: "You are called upon to render your verdict upon the evidence and testimony adduced at this trial, nothing else. I ask only one thing, that you do justice to this defendant, that you do justice to the United States".; and, 3. That the remarks in question were simply an unimpassioned response to the offensive language and conduct used by the appellant himself.

We submit that the trial court's analysis is supported by the case law. See *Mellor v. United States,* 160 F.2d 757, 765 (8 Cir. 1947), cert. den. 352 U.S. 827 ("[F]or such comment to constitute reversible error the language used must be plainly unwarranted and clearly injurious." (*Padron v. United States,* 254 F.2d 574, 577 (5 Cir. 1958) (comments invited by and as reply to defendant's remarks not prejudicial).

VIII.

THERE WAS NO ERROR IN THE SUPPLEMENTAL INSTRUCTION AS GIVEN BY THE COURT

Appellant urges as error certain allegedly vital omissions from the supplemental instruction given by the trial court. (Tr. Vol. VIII, pp. 2102-2104.) He has no standing to argue this matter before this court because no objection was taken at the time the instruction was given. (Tr. Vol. VIII, p. 2105.) Rule 30, Federal Rules of Criminal Procedure; *Cooper v. United States,* 282 F.2d 527, 534 (9 Cir. 1960); *Ryan v. United States,* 278 F.2d 836, 839 (9 Cir. 1960); *Harris v. United States,* 261 F.2d 897, 902 (9 Cir. 1958); *Davenport v. United States,* 260 F.2d 591, 595 (9 Cir. 1958) cert. den. 359 U.S. 909 (1959); *Pool v. United States,* 260 F.2d 57, 66 (9 Cir. 1958).

In any event appellant has here failed to reckon with the fact that his argument, relating to the necessity for inclusion of re-explanation of reasonable doubt, was specifically rejected in *Orton v. United States,* 221 F.2d 632, 635-36 (4 Cir. 1955) cert. den. 350 U.S. 821 (1955), and he has failed to explain away the five cases, including one from this court, cited by the court below, which approved supplemental instructions even though they did not contain references to reasonable doubt. (See R. pp. 177-178; App. pp. 55-56.)

CONCLUSION

We have attempted to summarize the very able discussion by the court below in its order denying appellant's motion for new trial. We have, as we mentioned, incorporated that opinion by way of an appendix to this brief. We earnestly invite this court's attention to that opinion, for it demonstrates beyond peradventure that appellant has failed to show error, must less, prejudicial error. Accordingly, we submit that the judgment of conviction should be affirmed.

June, 1961.

Respectfully submitted,

HOWARD W. BABCOCK
United States Attorney
District of Nevada

CLYDE R. MAXWELL, JR.,
Assistant Regional Counsel
Internal Revenue Service

(Appendix Follows.)

Appendix.

Appendix

DISTRICT COURT'S ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL, FILED MARCH 23, 1961

In the United States District Court
for the District of Nevada

Criminal No. 13,324

United States of America,	Plaintiff,
vs.	
Lavere Redfield,	Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

I. Preliminary Matters.

On October 28, 1960, a jury found defendant to be guilty on six counts of an eight-count indictment charging wilful evasion of federal income taxes. On November 1, 1960, defendant, appearing *pro se,* filed a motion for new trial. On November 3, 1960, defendant, through his newly retained counsel, filed another motion for new trial, which motion, we take it, supersedes that filed on November 1, 1960. On November 10, 1960, at the request of defendant's counsel, this Court granted a continuance on the motion for new

trial, on the ground that a proper resolution of the motion could not be made until such time as a transcript of the trial record could be made available both to counsel and to this Court. On February 21, 1961 and on March 1, 1961, the parties filed their respective memoranda of points and authorities in support of or in opposition to the instant motion. Oral argument was had on March 3, 1961, followed by the government's filing, per stipulation approved by this Court, additional documentation, namely, reports of psychiatrists, to which we refer *infra.*

To begin with, we note that a motion for new trial is addressed to the discretion of this Court. *Naval v. United States,* 278 F.2d 611, 615 (9th Cir., 1960); *Straight v. United States,* 263 F.2d 811, 813 (9th Cir., 1959); *Adams v. United States,* 191 F.2d 206, 207 (9th Cir., 1951); *Eagleston v. United States,* 172 F.2d 194, 200 (9th Cir., 1949), cert. den. 336 U.S. 952 (1949). Furthermore, it is well settled that motions for new trials are not favored, *United States v. Costello,* 255 F.2d 876, 879 (2d Cir., 1958), cert. den. 357 U.S. 937, and that they should be granted only with great caution. *United States v. Costello, supra,* at 879; *United States v. Pruitt,* 121 F.Supp. 15, 17 (S.D. Tex., 1954), affirmed 217 F.2d 648 (5th Cir., 1954), cert. den. 349 U.S. 907 (1955). Finally, we would point out that harmless error, that is, any error which does not affect substantial rights, shall be disregarded. *Federal Rules of Criminal Procedure,* Rule 52(a). In other words, in order to prevail on this motion defendant must show that the errors at the trial, if

any, were prejudicial to him. *United States v. Evett,* 65 F.Supp. 151, 152 (N.D. Cal., 1946); *Union Electric Light & Power Co. v. Snyder Estate Co.,* 15 F.Supp. 379, 382 (W.D. Mo., 1936). And, the burden of demonstrating prejudicial error is on the defendant. *United States v. Segelman,* 86 F.Supp. 114, 117 (W.D. Pa., 1949); *c.f., United States ex rel. Darcy v. Handy,* 351 U.S. 454, 462 (1956) (habeas corpus proceeding, wherein the Supreme Court stated that the burden must be sustained " 'not as a matter of speculation, but as a demonstrable reality.' "); *c.f., Myres v. United States,* 174 F.2d 329, 332 (8th Cir., 1949) (appeal), cert. den. 338 U.S. 849 (1949); see also, *United States v. Smith,* 179 F.Supp. 684, 686-87 (D.D.C., 1959), which notes that a motion for new trial will be granted only "if the Court finds that there is a reasonable probability that there has been a miscarriage of justice . . . ."

Before we proceed to apply these principles to the instant motion, we note that several points of error are alleged in the motion filed on November 3, 1960, but which were not alluded to either in defendant's memorandum or in his oral argument. Since he has not dignified these matters by way of supporting argument, we take it that he has waived them, as well he might, since they are clearly devoid of merit.[1]

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[1]The first two points which are raised by the motion, but not supported by the memorandum or argument, are that the verdict was contrary to the weight of the evidence and not supported by substantial evidence. As we shall point out, later in this opinion, the evidence of defendant's guilt was overwhelming, and in light thereof it would have been a miscarriage of justice had the jury acquitted. The motion also alleges that the Court erred in charging

II. Waiver of Right to Counsel.

The first point which defendant urges is that "defendant was not capable of competently and intelligently waiving his constitutional right to assistance of Counsel."

Although the Sixth Amendment to the United States Constitution preserves the right to be assisted by counsel, it is clear that said right may be waived. *Adams v. United States ex rel. McCann,* 317 U.S. 269, 275 (1942); *Johnson v. Zerbst,* 304 U.S. 458, 465 (1938). Indeed, the constitutional right "does not justify forcing counsel upon an accused who wants none." *Moore v. Michigan,* 355 U.S. 155, 161 (1957); *Linden v. Dickson,* 278 F.2d 755, 763 (9th Cir., 1960); *MacKenna v. Ellis,* 263 F.2d 35, 41 (5th Cir., 1959), cert. den. 360 U.S. 935 (1959); *United States v. Cantor,* 217 F.2d 536, 538 (2d Cir., 1954). And, a conviction will be reversed if it appears that a trial court has compelled a defendant to be represented by counsel against his will. *Reynolds v. United States,* 267

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the jury and in refusing to charge the jury as requested. Quite aside from the fact that defendant has, under Rule 30 of the Federal Rules of Criminal Procedure, waived his right to assign error because he failed to object to the instructions before the jury retired we cannot even find one statement by defendant at this time which points out where the Court erred, except his reference to the so-called Allen instruction, with which matter we deal extensively later in this opinion. Suffice it to say that the instructions were a fair, complete and accurate statement of the applicable principles of law. The motion also alleges that the Court denied the defendant the right to cross-examination. Beside the fact that the record shows exactly to the contrary, we note that defendant has failed to cite instances of this alleged conduct on the part of the Court, unless, of course, he had in mind the occasions when the Court reprimanded or otherwise cautioned defendant as to the rules relating to the proper scope of cross-examination.

F.2d 235, 236 (9th Cir., 1959); *compare United States v. Cantor, supra,* at 538, where the court observed that appointment of counsel amounted to "some curtailment of his right to proceed alone, and if any prejudice to the appellant was the result of that the judgment should be reversed."

There can be no doubt but that defendant had waived his right to assistance of counsel. On June 16, 1960, some two and a half months prior to the commencement of trial, a hearing was held in open court for purpose of arraignment, at which time this Court asked defendant whether he was represented by counsel, to which question defendant responded in the negative. *Reporter's Transcript of Procedings,* vol. I, p. 4, lines 14-16 (hereinafter cited as Tr.). The Court specifically advised him that he had a right to be represented by counsel, Tr., vol. I, p. 4, lines 17-20, and then inquired as to whether defendant had sufficient funds with which to employ counsel. Tr., vol. I, p. 4, lines 21-22. Mr. Redfield responded by stating: "I do not wish representation." Tr., vol. I, p. 4, line 23. Within a moment or so, defendant again stated: ". . . I would prefer to represent myself." Tr., vol. I, p. 5, line 3. There then followed the following colloquy: "The Court. Very well. It is your desire, then, that you not be represented, but that you represent yourself in this case? Mr. Redfield. That is my desire. The Court. And on the basis of that you have refused the Court's offer to appoint counsel for you? Mr. Redfield. Yes, your Honor." Tr., vol. I, p. 5, lines 9-15.

There followed various hearings and informal conferences between defendant and this Court, all of which will be discussed presently. However, on the first day of the trial, October 4, 1960, the transcript shows the following:

> "The Court. The record will indicate that the defendant, LaVere Redfield, has heretofore waived the right to have an attorney, and has elected to represent himself.
>
> Is that correct, Mr. Redfield?
>
> Mr. Redfield. That is so, your Honor." Tr., vol. I, p. 39, lines 24-25; p. 40, lines 1-3.

Since the record is crystal clear that there was a waiver of counsel, the remaining question is whether there has been a competent, intelligent and understanding waiver, which problem we shall deal with in Section III, *infra.* But, we must first consider defendant's argument, raised in his memorandum at page 6, that "the record in the case at bar does not establish that the Court made any determination as to whether or not defendant competently and intelligently waived his right to Counsel." This argument was extended in the March 3, 1961 hearing, when defendant apparently took the position that a new trial was required *because* this Court allegedly did not make a finding of record. Indeed, if we understand him, defendant asserts that there was reversible error because this Court did not have a special hearing, presumably one akin to the hearing we have under 18 U.S.C. sec. 4244.

Should this Court determine at this time that defendant did not properly waive his right to assistance

of counsel, then of course he is entitled to a new trial. But, it is quite another matter to ask for a new trial on the ground that there was no formal hearing and determination of record at the time defendant did waive his right.

Defendant relies heavily on the passing statement in *Johnson v. Zerbst,* 304 U.S. 458, 465 (1938), that "while an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

The Court of Appeals for the Ninth Circuit answered defendant's argument in the case of *Widmer v. Johnston,* 136 F.2d 416, 418 (9th Cir., 1943), cert. den. 320 U.S. 780 (1943). There the Court noted that its attention had been directed to the passage quoted from *Johnson v. Zerbst.* It went on to hold, however:

> "While it would doubtless be a better practice to record the fact of a determination of proper waiver of counsel, still the failure to do so does not negative that such determination was made. The recordation would go merely to the matter of proof." 136 F.2d at 418.

We might agree with defendant had there been any indication at the time of his waiver that defendant was not possessed of his complete mental faculties. Under those circumstances, it may have been appropriate to have had a psychiatric hearing. But, in *Hall v. Johnston,* 103 F.2d 900 (9th Cir., 1939), it

was pointed out that at the time of the defendant's plea of guilty the trial judge knew that defendant was insane, 103 F.2d at 900; yet, the Court of Appeals did not order a reversal of the conviction, but merely remanded for a present hearing as to whether defendant understandingly waived his right to counsel. 103 F.2d at 901.

It is all too easy to say at this stage of the proceedings what would have been the most wise course of action to follow at the time defendant waived his right. Even in light of the passage from *Johnson v. Zerbst,* however, the Courts of Appeals time and again have affirmed convictions or denied writs of habeas corpus where no more, and often less, was done by the trial court than was done here. See, *e.g., Williams v. Swope,* 186 F.2d 897, 898-900 (9th Cir., 1951); *O'Keith v. Johnston,* 129 F.2d 889, 891 (9th Cir., 1942), cert. den. 317 U.S. 680 (1942); *Binder v. United States,* 231 F.2d 314, 314-15 (6th Cir., 1956), cert. den. 351 U.S. 969 (1956); *Smith v. United States,* 216 F.2d 724, 726 (5th Cir., 1954); *Ray v. United States,* 192 F.2d 658, 659 (5th Cir., 1951); *Woolard v. United States,* 178 F.2d 84, 88 (5th Cir., 1949); *Ossenfort v. Pulaski,* 171 F.2d 246, 247 (5th Cir., 1948); *Wood v. Howard,* 157 F.2d 807, 808 (7th Cir., 1946), cert. den. 331 U.S. 814 (1947).

In any event, although we desire to go on record as holding that, at least where there is no prima facie indication that a defendant is mentally incompetent, there is no need to have a special hearing of record, psychiatric or otherwise, to determine whether a de-

fendant competently has waived his right to counsel, we further hold that the failure to have such a hearing in this case is not ground for a new trial, since, as we shall show, defendant did competently waive his right to counsel. In other words, even assuming *arguendo* that such special hearing was necessary, the lack of it did not prejudice this defendant, and, as we pointed out earlier, new trials will be granted a defendant only when there is a clear showing that the alleged error resulted in prejudice to him.

III. Defendant Waived His Right to Counsel in an Intelligent, Understanding and Competent Manner.

Our purpose now is to reaffirm the previous determination of this Court that defendant did competently, intelligently and understandingly waive his right to counsel. Although a formal determination of record was not made at the time defendant waived his right, the Court had an adequate opportunity to discuss the matter with defendant, both on and off the record, and did determine for itself that defendant's choice to appear *pro se* was made with his "eyes open." See *Adams v. United States ex rel. McCann,* 317 U.S. 269, 279 (1942).

To begin with, this defendant cannot say here, as did the defendant in the famous case of *Johnson v. Zerbst, supra,* at 467, that he was unaware of his right to be represented by counsel. The Court advised him of that right. Tr., vol. I, p. 4, lines 17-20.

The Court then determined that defendant was financially able to retain counsel if he desired to do so.

Tr. vol. I, p. 4, lines 21-25, p. 5, lines 1-8, p. 31, lines 10-18. Since defendant was able to retain counsel, it was not necessary to appoint counsel. See Rule 44, *Federal Rules of Criminal Procedure* ("if the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding *unless he elects to proceed without counsel or is able to obtain counsel.*"); *United States v. Arlen,* 252 F.2d 491, 495 (2d Cir., 1958) ("counsel need not be assigned if a defendant is able to obtain his own counsel . . ."). Nonetheless, defendant knew of and refused the Court's offer to appoint counsel for him. Tr., vol. I, p. 5, lines 13-15.

It is clear, then, that defendant was well aware of his constitutional and statutory rights.

The next fundamental question is whether defendant knew what he was getting into. Did he appreciate that any law suit is complicated, at least to a layman, and that a criminal charge is a matter not to be dealt with lightly? The record shows that he did.

The Court pointed out that no matter how skilled the layman is in the fundamental rules of law, no lay person is very familiar with procedural aspects, and that that fact makes it difficult both for the defendant appearing *pro se* and for the Court. Tr. vol. I, p. 7, lines 5-12. The Court asked defendant whether he thought the trial of the charges against him was child's play, to which he replied that he had no such thought. Tr., vol. I, p. 17, lines 19-25, p. 18, lines 1-2. The

Court impressed upon defendant that he was in an important and grave situation, and the defendant with a seriousness which the cold record does not show, responded that he was aware of those facts. Tr., vol. I, p. 18, lines 3-7.

The defendant was well aware of the charges against him. Upon arraignment, the indictment was read to him, and a copy was handed to him. Tr., vol. I, p. 6, lines 6-14. As a matter of fact, as we shall discuss *infra*, the defendant was sufficiently aware of what was going on that he demanded a bill of particulars. The Court advised him of the possible penalties should he be adjudged guilty. Tr., vol. I, p. 7, lines 17-23. This defendant knew of the ultimate consequences should his prosecutors prevail.

What this Court has so far related is important in that it shows that defendant was well aware of what he was doing. Significant, however, is the manner in which defendant made his statements and responded to the queries of the Court. Everything that he did or said was done in a calm, deliberate and convincing manner. When he stated that he desired to represent himself, there was no hesitation in his voice. When he stated, "I feel I am competent to defend myself," Tr., vol. I, p. 14, line 20, he did so with that convincingness that comes from the totally rational man who speaks with a soft voice. At all times relevant to the matter now under inquiry he was alert, courteous, and determined. Who will deny that "the demeanor, the facial expression, and the responses made by the

accused soon may convincingly disclose to an experienced trial judge whether the accused is intelligently and understandingly waiving his constitutional rights.''? *Davis v. United States,* 123 F.Supp. 407, 412 (D. Minn., 1954), affirmed 226 F.2d 834 (8th Cir., 1955), cert. den. 351 U.S. 912 (1956).

Although it is not totally uncommon for a defendant to waive counsel,[2] this Court was concerned about defendant's determination to do so, mainly because of the type of suit here involved. Defendant, whether represented or not, would not have an easy time of it, since from past experience the Court knew that the government would be well prepared, as, indeed, it was. Between the time of arraignment on June 16, 1960 and the time the trial began, on October 4, 1960, this Court had occasion to meet with defendant *in camera.* There were three to five such conferences, often as not dealing with defendant's desire to obtain a bill of particulars. On at least two of these occasions, there may have been more, the Court frankly discussed the matter of waiver with defendant, told him what he was getting into, and virtually pleaded with him to reconsider his determination to appear *pro se.* The defendant was adamant, but not in a belligerent manner. It was simply a case where an undeniably intelligent businessman had made an assessment of

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[2]A check of the records for the Las Vegas division of this Court shows that during 1960 there were 93 defendants who entered pleas to criminal charges, 10 of whom waived counsel. Some 49 defendants were sentenced in Las Vegas, 10 of whom waived counsel at the time of imposition of sentence.

where he stood and what he wanted to do about it. He was stubborn about his decision, but gave absolutely no indication that he did not know exactly what he was doing.

Which leads us to another matter. It needs no citation to the transcript or otherwise for this Court to note that defendant is an eminently successful financier. He has amassed a considerable fortune, and in the course of doing so doubtless had to make decisions on which could turn the fate of hundreds of thousands, if not millions, of dollars, a subject which even he asserts is dear to his heart. See defendant's memorandum in support of this motion, p. 26, lines 25-26, where Dr. Raymond Brown states that "he has quite literally placed money about his life in his persceptive of values." This then, was not one of those waiver-of-counsel cases where the court found a 17 year old defendant, who had never gone beyond the third grade, who had had virtually no contact with the outside world, and who was not accustomed to making decisions which were extremely important to him. In short, this Court respected the man for what he was; there was no question in the Court's mind but that however poor his judgment may have been, the defendant's waiver of counsel was done in an intelligent, understanding and competent manner.

Once he had waived counsel, the Court made it plain to defendant that "it can't be an attorney for you; it can't tell you what to do, how to do it, or when to do it." Tr. vol. I, p. 18, lines 11-12. The Court

also impressed upon him that he had no more standing because he was defending himself than would any other person. Tr., vol. I, p. 18, lines 21-23. All of this he gave every indication of having understood. Despite this clarification of the ground rules, so to speak, the defendant never waivered from his determination to appear *pro se*.

So much, then, for the factual background upon which this Court based its conclusion that there was a proper waiver of counsel, a conclusion, though not expressed as a matter of record, was one which was uppermost in the Court's mind when it decided to allow defendant to defend himself.

But, we are now told by psychiatrists of defendant's own choosing that he was incompetent to waive his right. On the other hand, one psychiatrist chosen by the government states that he cannot reach a conclusion, and the other unequivocally states that defendant did competently and intelligently waive his right. Nothing would be gained by adding up the "votes," as it were, and then reaching a conclusion one way or the other. We deem it our function to compare these reports, and then to evaluate them in light of the findings which this Court has made and will make on the basis of its own observations.

Drs. Raymond Brown and Toller, both of whom were retained by defendant, say, in essence, that defendant is obsessed with money, that he has a compulsion to make money and that money assumed more than natural proportions to him. When they point out

that he has certain eccentric characteristics, both rely on incidents which show that defendant is parsimonious. Dr. Raymond Brown mentions ambulatory schizophrenia, while Dr. Toller alludes to the possibility. Dr. Raymond Brown concludes that defendant has a distorted sense of values, which conclusion obviously relates to defendant's great desire for money. Dr. Toller says that defendant gives as a reason for waiver of counsel the fact that he would have to earn too much money to pay for fees. In short, both men seem to agree that somehow or other the decision to waive counsel was motivated by an inner desire to save money. Dr. Raymond Brown concludes that the decision to appear *pro se* was motivated by irrational factors, which simply means that it is that doctor's opinion that the decision to maintain his fortune by doing without counsel is irrational.

On the other hand, Dr. Gericke, who was retained by the government, disputes Dr. Raymond Brown's judgment that the decision was irrational. Said Dr. Gericke: "His thinking and behavior appear reasonable, and he suffered no disorder of thinking which would render his actions irrational or unwarranted. He acted in the exercise of his best judgment."

In an apparent attempt to pin-point a specific mental disorder which allegedly caused defendant to sacrifice representation by counsel merely because he could save some money, Dr. Raymond Brown speaks of "extreme obsessive compulsive traits" and Dr. Toller states that the defendant "has a psycho-neurosis, com-

pulsive type." Dr. Gericke, who had before him the Brown-Toller reports at the time he made his findings, concluded, however: "There is no evidence of impulsiveness nor emotional instability." Quite aside from the obvious fact that the experts do not agree, this Court is of the opinion that to say that defendant has a compulsive desire to accumulate wealth is of no help in this case. Many people have compulsive desires to make money, and often as not wind up in a hospital because of various illnesses induced by overwork. But, although these men, many of whom are members of our profession, may be said to exercise poor judgment, few could doubt that their actions are competent, intelligent, or understanding in the legal sense. Or, as Dr. Richard Brown, who was retained by the government, has succinctly put it: "Some of the possibilities would be that he simply wanted to save money. This would represent poor judgment but if the man were psychotic and felt, for example, that he had to have money to keep away the devil, his judgment would be based on a delusion." In this connection, both Drs. Toller and Gericke agree that defendant has not been suffering from hallucinations, and none of the experts has concluded that defendant is psychotic. Dr. Toller's view that defendant is suffering from a psycho-neurosis unquestionably cannot be taken as a conclusion that he is psychotic, for the term "psycho-neurosis" is commonly used merely as a synonym for "neurosis." *Chapman v. Finlayson Lease,* 56 Ariz. 224, 107 P.2d 196, 198 (1940); *O'Kelly & Muckler, Introduction to Psychopathology* 202 (2d ed., 1958) ("The term psychoneurosis is used inter-

changeably at present with the shorter term neurosis.").

We would be concerned if there had been a finding that defendant was suffering from a psychosis, but there is a vast difference between that type of mental illness and a neurosis. To begin with, we are told that a neurosis is a "mild functional personality disorder in which there is no gross personality disorganization and in which the patient does not ordinarily require hospitalization." *Coleman, Abnormal Psychology and Modern Life* 632 (1950). More precisely, the "psychoneuroses are mild or minor mental reactions which represent attempts to find satisfaction in life situations rendered unsatisfactory by faulty attitudes or by faulty emotional developments." *Strecker, Ebaugh & Ewalt, Practical Clinical Psychiatry* 358 (6th ed., 1947). "The psychoses, on the other hand, are usually disordered reactions of such intensity or such inclusiveness with respect to all parts of the personality that any sort of compromise with normal social requirements is impossible." *O'Kelly, op. cit. supra,* at 202-03. Unlike the neurotic, "the behavior in the psychotic is usually unpredictable and very frequently anti-social to the extent that it makes him dangerous to himself or to the persons around him. The psychotic does not appreciate the rights of other persons and thus has difficulty in conforming to the demands and mores of the group in which he lives. In a few words, the psyhcho-neurotic patient generally is in much closer contact with his environment than the psychotic and, as it were, far fewer phases of his per-

sonality are in obvious disharmony with the responsibilities and expectations of everyday living." *Strecker, op. cit. supra,* at 358-59. See also, *Coleman, op. cit. supra,* at 233.

Even assuming for purposes of argument that Dr. Toller was correct in his diagnosis of neurosis, diagnosis which, we hasten to point out, is not concurred in by the other psychiatrists, how much weight should we give to it, bearing in mind that we have cited authorities which classify a neurosis as being only a mild or minor mental reaction? Should we be more concerned here than was the Court of Appeals for the Fifth Circuit, when it found that there was a competent waiver, even though one of two psychiatrists there had testified that that defendant was suffering from manic depression insanity and could not even stand trial? *Kaplan v. United States,* 241 F.2d 521, 522, n. 3 (5th Cir., 1957), cert. den. 354 U.S. 941 (1957). Should we find no valid waiver when the Court of Appeals for the Second Circuit found a valid one even though two psychiatrists had testified that the defendant there "was a psychopathic personality and in need of treatment . . . "? *United States ex rel. Rhyce v. Cummings,* 233 F.2d 190, 194 (2d Cir., 1956), cert. den. 352 U.S. 854 (1956).

This Court desires again to point out that defendant is not a man inexperienced in making decisions as to how to spend his money. Just because he used what may have been an inordinate amount of care on the occasion here in question, why should we say now that his actions are any less competent, intelligent

and understanding than the man who refuses to take out that extra, but needed, fire insurance on his home, or the man who refuses to retain counsel because he believes he is guilty and that nobody can help him?

Let us pass, for the moment, to the idea expressed by Drs. Raymond Brown and Gericke that one reason behind defendant's waiver may have been his innate belief that he was innocent, that truth would ultimately prevail and that the jury would therefore acquit. From these premises, we are to gather, the defendant assumed that he did not need counsel, for representation would be an idle act.

As a legal proposition, we cannot accept this line of reasoning. This is because no matter what defendant may have told the psychiatrists about his being innocent, this Court is bound by the finding of the jury that he *willfully* evaded income taxes. A man who willfully does acts which constitute a crime, a man who, we have found, understood the nature of the charges against him, is not a man who can honestly say that he knows he is innocent.

Whatever may have been defendant's real reasons for waiving counsel,[3] it is quite possible that the psy-

[3]Of course, it is admittedly difficult to delve into a person's mind and determine what his "real" reason was for pursuing a given course of conduct. Aside from the reasons advanced by two of the psychiatrists, however, the Court should like to make its own suggestion. Defendant knew that since a unanimous verdict would be necessary to convict him, his chances of acquittal were favorable. He also knew that the transactions which the government would have to prove were extremely complicated and likely as not could not be traced by the Internal Revenue Service, much less by a jury of lay persons. Here, of course, defendant underestimated the

chiatric reports, especially those submitted by defendant, suffered from the fact that defendant was less

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perseverance of Mr. Martin Hoffenblum, Special Agent for Internal Revenue Service. When we refer to these complicated transactions, we are thinking of the confounding manipulations concerning the Reno Brewing Co. and those involved in the sale of 89,800 shares of the stock of Pacific Clay Products Co., a sale involving in excess of one Million dollars. Even if he wanted to explain to an attorney the schemes which he used to hide income, we have grave doubts that most lawyers could gain a sufficient familiarity with what had transpired so as to be able effectively to combat the government's case. In fact, defendant knew more about the subject matter of the suit than even the government did. For example, despite intensive investigation, it was only in the course of Mr. Redfield's defense that the government was able to uncover one more of the often-used nominee accounts, that of Myra McCue. See Tr., vol. VI, pp. 1631, 1633, Tr., vol. VII, pp. 1656, 1712.

Is it too far-fetched to believe that, say, when it came time to cross-examine government witnesses, Mr. Redfield could not honestly believe he was more competent than an attorney?

Since, because of what we have just stated, defendant could believe that he had a reasonable chance of being acquitted, is it not possible that another thought crossed his mind, namely, that he could play upon the sympathy of the jury? After all, here would be a man, small in physical stature and unskilled in the technicalities of the law, facing a battery of highly competent government attorneys and agents. Under those circumstances he could say, as he did: "In my case I am interested only in the true facts of the case; the complete and thorough presentation of all facts concerning this case, and if that is presented I have no fear, no hesitancy as to what the judgment of this jury will be." Tr., vol. I, p. 146, lines 3-6. He could also say to the jury, as he did: "I, of course, am not an attorney. I know absolutely nothing about the law. * * * * Those who know the law may have an advantage over me, in that they might know something to do or something to say—shall we say tricks of the trade . . . ." Tr., vol. I, p. 145, lines 9-10, 17-19. He could accuse, as he did, the government of using "unsavory tactics," Tr., vol. VIII, p. 2012, lines 7-9, and he could raise the cry of "Gestapo tactics." Tr., vol. VIII, p. 2012, lines 24-25, p. 2013, lines 1-4. He could also insinuate that he was being "singled out for special treatment." Tr., vol. VIII, p. 2013, lines 6-7.

In short, this Court is suggesting that perhaps defendant's decision to appear without counsel was a careful calculation, albeit an incorrect one as it turned out, by an undeniably shrewd man, who was well aware of his rights and knew exactly what he was doing.

than candid during his examinations. Dr. Richard Brown has stated: "One thing does stand out with this man; he is not revealing all that he knows." That, incidentally, was a characteristic revealed by defendant during the course of the inquiry by the Probation Officer as the latter was preparing his presentence report. In any event, the assertion that defendant was withholding from his examiners, an assertion which stands uncontradicted, cast grave doubts on the conclusions of Drs. Raymond Brown and Toller that defendant did not validly waive his right to counsel.

But, even taking these two reports at face value, something which we would not be required to do even if they went unchallenged, *Blodgett v. United States,* 161 F.2d 47, 56 (8th Cir., 1947), how can they be squared with the conclusion reached by this Court, at the time of the waiver, that defendant acted in a competent, rational and intelligent manner? The short of it is that they cannot.

Before proceeding further, however, this Court will observe that a careful reading of the numerous cases in this area indicates that the courts, in determining whether there has been a valid waiver, will consider the entire record of the case. Indicative of this approach is the statement appearing at page 464 of the opinion in *Johnson v. Zerbst, supra:* "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surround-

ing that case, including the background, experience, and conduct of the accused."

Perhaps it is because of this approach to the problem that the courts in the *Kaplan* and *Cummings* cases, *supra,* ruled that the waivers did meet the constitutional test, even though psychiatrists had opined to the contrary.

In line with the idea that the courts are to consider all relevant circumstances, we cite at least one case where the court took into account the fact that defendant was no stranger to the courts. See *Williams v. Swope,* 186 F.2d 887, 889 (9th Cir., 1951). Such factor is relevant because it shows that the defendant who has been in court before knows that a trial is a serious proceeding, that there are certain procedures which must be followed and that the managing of a case is within the peculiar compentency of a member of the bar. A person who on numerous occasions has been a litigant cannot be said to be ignorant of the functions served by an attorney, and hence, when he waives his right to counsel, we can only assume that he did so with his eyes open, assuming as we do that the defendant knew he had a right to counsel. It is because of the insight which a person gains from litigating that we deem it irrelevant that his prior court experiences were civil in nature.

Although this Court was dimly aware of the fact that the defendant had been engaged in several law suits prior to the one here in question, it did not take

into account then, as it does now, that defendant has had extensive court experience.[4] This Court takes judicial notice of the fact that defendant represented himself in the case of *Securities & Exchange Commission v. Redfield,* United States District Court for the District of Massachusetts, Docket No. 55-68W (1955). For what it is worth, we note from a newspaper clipping dated February 16, 1955 that Judge Wyzanski inquired of Mr. Redfield whether he had funds sufficient to employ an attorney. Mr. Redfield responded in the affirmative, added that he did not need a lawyer, and the record shows that he continued to represent himself right up to the very time judgment was entered against him.

We also take judicial notice of the fact that defendant represented himself in the case of *Guild v. Redfield,* Second Judicial District Court of the State of Nevada, Docket No. 185,955 (1960). With respect to that case, we further note the affidavit of one of the plaintiffs, a member of the bar of this Court, that defendant there "appeared to be fully competent to represent himself."

Finally, we take judicial notice of the fact that Mr. Redfield appeared, either as plaintiff or defendant,

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[4]In addition to the cases to which he was a party, defendant served as a member of the federal grand jury for the District of Nevada from November 25, 1957 through April 23, 1959. That particular panel returned 24 indictments, ranging from Dyer Act violations to false representation as a citizen, and from narcotics violations to misapplication of bank funds. This experience must have contributed to defendant's knowledge that criminal prosecutions are not matters to be dealt with lightly.

in some sixteen additional actions, all of which were before the Second Judicial District Court of the State of Nevada, unless otherwise noted.[5]

We cite all of this not to indicate that defendant is not entitled to the full measure of his constitutional rights, but only to show that he was no stranger to courts and that such fact points to a conclusion that he knew exactly what he was doing when he waived his right to counsel.

In conclusion, we note that it is settled law that the defendant "has the burden of showing, by a preponderance of the evidence, that he did not have counsel and did not competently and intelligently waive his constitutional right to the assistance of counsel." *Moore v. Michigan,* 355 U.S. 155, 161 (1957); *Watts v. United States,* 273 F.2d 10, 11-12 (9th Cir., 1959), cert. den. 362 U.S. 982 (1960); *O'Keith v. Johnston,* 129 F.2d 889, 890 (9th Cir., 1942), cert. den. 317 U.S. 680 (1942); *c.f., Blood v. Hudspeth,* 113 F.2d 470, 471 (10th Cir., 1940) (ordinarily it will be presumed that the waiver was valid); *c.f. Kelly v. Aderhold,* 112 F.2d

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[5]*Steinheimer v. Redfield,* Docket No. 54,883 (1936); *Washoe County v. Bushard,* Docket No. 128,289 (1950); *Bell Telephone Co. v. Bushard,* Docket No. 131,968 (1950); *Redfield v. First National Bank,* Docket No. 147,426 (1953); *City of Reno v. Bushard,* Docket No. 150,375 (1954); *Lyons v. Redfield,* Docket No. 150,763 (1954); *Baker v. Boyd,* Docket No. 151,296 (1954); *Commercial Credit Corp. v. Mathews,* Docket No. 160,234 (1956); *State of Nevada v. Bushard,* Docket No. 162,707 (1956); *Reno Brewing Co. v. Redfield,* Docket No. 163,756 (1956); *Wantz v. Redfield,* Docket No. 166,967 (1957); *Redfield v. Chisholm,* Docket No. 168,120 (1957); *Redfield v. Peterson,* Docket No. 175,558 (1958); *A. L. Jameson & Co. v. Redfield,* 4 P.2d 817 (Cal.App., 1931); *Redfield v. Barnhart-Morrow Consolidated,* 60 P.2d 887 (Cal.App., 1936); *Dunbar v. Redfield,* 61 P.2d 744 (Cal., 1936).

118, 119 (10th Cir., 1940) (same as *Blood v. Hudspeth, supra.*) Upon a consideration of all the evidence—the psychiatric reports, the statements and conduct of defendant, his past experiences both in and out of court, and his demeanor—this Court finds that defendant has not met the burden of proof which the above-cited cases place upon him. Accordingly, we find as fact, *Michener v. Johnston,* 141 F.2d 171, 175 (9th Cir., 1944), that defendant waived his right to counsel in a competent, intelligent and understanding manner.

IV. Defendant Was Not Denied a Fair and Impartial Trial, Nor Were His Rights Under the Sixth Amendment Violated by Virtue of the Nature of His Defense.

The next major point is defendant's contention that he "was denied his constitutional right to a fair and impartial trial because defendant, acting as his own Counsel, was not capable of conducting his defense and the record of the trial in this cause establishes that defendant was so ignorant of law and procedure and his defense was so inadequate and incompetent that he has been deprived of his liberty in violation of his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States." *Defendant's Memorandum of Points and Authorities,* p. 7.

Of course, defendant does not here allege that defendant was incompetent to stand trial. That much was settled at the hearing on March 3, 1961. What

defendant is saying is that he was not capable of doing for himself that which we might reasonably expect of an attorney.

Before going further, we pause to note that defendant's counsel show a lack of understanding of the law applicable to this case in that it is elementary that the Fourteenth Amendment has no bearing whatever on criminal prosecutions in the federal courts.

We have already determined, it will be remembered, that defendant validly waived his right to counsel and that we could not force counsel upon him under those circumstances. Now, however, defendant tells us that his Sixth Amendment rights were impaired because he allegedly did a poor job of representing himself. This, in effect, is a contention that competency to waive counsel can only exist if the defendant is qualified to try a law suit. The case law does not even suggest such a possibility.[6] Indeed, the Supreme Court has held that when a lawyer-defendant waives counsel, the fact that he has had professional experience may be a factor in determining whether he actually waived his right to the assistance of counsel, "but it is by no means conclusive." *Glasser v. United States,* 315 U.S. 60, 70 (1942). By negative inference, therefore, the fact that one is not an attorney should not be of any consuming concern.

What, then, can be expected of this Court? Were we supposed to give defendant a course in the art of

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[6]As a matter of fact, the language which we have quoted *infra* from our Circuit's opinion in the *Burstein* case indicates that lack of skill in representing oneself has nothing at all to do with rights under the Sixth Amendment.

trying a law suit? To state the question is to state the answer. Were we supposed to coach him every step of the way, tell him what to ask of witnesses—in short, act as counsel for him? To do so would clearly have transcended the proper functions of the court. The Court of Appeals for the Ninth Circuit put it well when it stated:

> "When appellant chose to proceed without counsel, he chose a course of action fraught with the danger that he would commit legal blunders. But having made that choice he did not thereby acquire the right to have the court act as his counsel whenever he seemed to be blundering. *It cannot be said that the court denied him representation of counsel, or denied him a fair trial, because the judge refrained from intermeddling.*" *Burstein v. United States,* 178 F.2d 665, 670 (9th Cir., 1949) (emphasis added).

Or, as the Court of Appeals for the Fifth Circuit has put it: "Once it is found, however, that such an accused has properly waived his right to counsel, the effects flowing from that decision must be accepted by him, together with the benefits which he presumably sought to obtain therefrom." *Smith v. United States,* 216 F.2d 724, 727 (5th Cir., 1954). See also, *Michener v. United States,* 181 F.2d 911, 918 (8th Cir., 1950) ("If an accused were represented by counsel, it most obviously is not the duty nor the privilege of the judge to suggest or explain possible defenses in behalf of the accused. And upon finding a competent, intelligent and intentional waiver of counsel, it is not then any the more the duty of the trial judge to advise an accused respecting possible defenses.").

Notwithstanding what we have just said, however, the Court did, on numerous occasions, give advice to defendant or otherwise help him to defend himself.[7] Moreover, as our Circuit commented in another case, "the manner in which he handled himself show[s] that although his ideas of a defense were extraordi-

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[7]We cite the following only as some of the relevant examples. No attempt has been made to exhaust the transcript.

The Court carefully explained to defendant the nature of the two types of challenges to the jury during the process of impanelling, how many challenges were allowed to the various parties and the procedure to follow. Tr., vol. I, p. 41, lines 15-23; p. 62, line 25 - p. 63, line 2; p. 66, lines 5-15; p. 66, line 21 - p. 67, line 17; p. 69, lines 11-23; p. 78, line 3 - p. 79, line 8.

The Court explained the rule excluding witnesses from the courtroom until they are called to testify. Tr., vol. I, p. 130, lines 11-25.

The Court cautioned defendant to scrutinize offers of documentary evidence before he stipulated to their admission, and advised defendant to assert his right even "if the Court gets a little fast." Tr., vol. I, p. 154, line 19 - p. 155, line 1.

The Court explained the scope of proper cross-examination. Tr., vol. III, p. 633, lines 12-20.

The Court suggested the proper form of questions. Tr., vol. III, p. 635, lines 4-24; p. 787, lines 9-12; and Tr., vol. V, p. 1380, lines 22-24; p. 1382, lines 1-2.

By way of direct assistance to defendant, the Court let down the ordinary rules of evidence and procedure by allowing defendant, during his cross-examination of government witnesses, to elicit direct evidence as to his reputation. Tr., vol. III, p. 633, line 7 - p. 634, line 9; and Tr., vol. V, p. 1285, lines 3-16. The Court allowed certain of defendant's questions to stand, even though they were improper. Tr., vol. IV, p. 892, lines 11-18; p. 1112, lines 6-14. The Court even asked defendant certain questions during the latter's cross-examination of a government witness, with the result that defendant was enabled to bring out facts that would always have to be brought out during his own case in chief. Tr., vol. IV, p. 870, line 7 - p. 871, line 23.

Defendant will not deny that during the earlier-mentioned conferences between defendant and the Court, all of which were held in chambers, the Court carefully advised defendant of his rights and the procedure to be followed in connection with his demand for a bill of particulars.

Finally, as we shall point out later in this opinion, the Court fully and carefully explained to defendant the proper scope and subject matter of a closing argument.

narily unorthodox, he was alert and intelligent." *Burstein v. United States, supra,* at 670.[8]

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[8]By way of partial example only, and without attempting to exhaust the record, we would note the following:

The defendant was sufficiently alert to make objections to proffers of testimony or documents. See, for examuple: Tr., vol. I, p. 188, line 9 - p. 191, line 7 (tax returns outside of indictment years); Tr., vol. I, p. 193, lines 1-8 (same); Tr., vol. I, pp. 194-95 (photostatic copies of documents); Tr., vol. II, p. 347, lines 3-4 ("you are putting words in the witness' mouth . . . ."); Tr., vol. III, p. 616, lines 6-24 (deposit slips outside of indictment years); Tr., vol. III, p. 624, lines 24-25 (ledger sheets outside of indictment years); Tr., vol. III, p. 644, lines 11-12 (document remote in time); Tr., vol. III, p. 677, lines 18-20 (checks outside of indictment years); Tr., vol. III, p. 687, lines 13-14 (same); Tr., vol. IV, p. 846, line 14 - p. 847, line 1 ("Your honor, yesterday just before adjourning for the noon recess, I was handed what is called a supplemental bill of particulars by counsel for the plaintiff, and upon what search I made I find that where a pretrial bill of particulars has been rendered, which was done on September the 10th, the Government's proof is measured and limited by the statements made in said bill of particulars, and it is not permitted that they can be amended of [by?] a supplemental bill of particulars brought in during the course of trial, and I have here a notation of points and authorities in support of that contention."); Tr., vol. IV, p. 900, lines 10-11 ("Objected to, your Honor, on the basis that it calls for a conclusion of the witness."); Tr., vol. IV, p. 993, lines 5-10, 23-24 (testimony as to subject matter not included in bill of particulars); Tr., vol. V, p. 1192, lines 13-14 and p. 1193, lines 2-6 (testimony of witness in toto); Tr., vol. V, p. 1225, lines 12-16 (tax return outside of indictment years); Tr., vol. V, p. 1240, lines 3-5 (best evidence rule); Tr., vol. V, p. 1241, lines 6-8 ("These likewise are objected on on the basis that they are not the best evidence, that the originals are the best evidence.")

Though defendant may be technically correct in saying that he "did not register twenty objections during the entire four-week trial," the statement misses the point. This is because counsel fails to point out, even at this time, those proffers of evidence which were subject to objection. Furthermore, the objections which defendant did make suggest that he was alert and ever conscious to preserve his rights.

We cannot take too seriously defendant's statement that he "had no idea how to conduct a cross-examination of an adverse witness." Although he may have not revealed the skill or glibness of television's Perry Mason, the record shows that he had an excellent grasp of the facts in question and that he was alert to bring out any information possessed by the witness which would help his own case. See, for example, his cross-examination of

The case cited by defendant, *Lunce v. Overlade,* 244 F.2d 108 (7th Cir., 1957), is inapposite because that

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Harold S. Chisholm, Tr., vol. III, pp. 784-804; of William Rollo, Tr., vol. III, pp. 809-10 (wherein defendant carefully attempted to set the stage for a claim that the Oregon-Nevada Lumber Co. was nothing other than a dummy corporation); of Richard M. Hughes, Tr., vol. III, pp. 814-15 (same); of Roland N. Dohr, Tr., vol. III, pp. 827-30 (wherein defendant elicited testimony that profits made by him, allegedly on behalf of Reno Brewing Co., were received by said firm); of Tung S. Fong, Tr., vol. V, pp. 1157-1159 (wherein defendant brought out that with respect to the nominee account there in question he had never been requested to pay dividends to the nominee); of Sarah E. Dolan, Tr., vol. V, pp. 1173-74 (wherein defendant was able to get into the record that this particular nominee never had any occasion to doubt the manner in which he was handling her account and that he was a most generous man); of Harry M. Green, Tr., vol. V, pp. 1244-47, 1248 (wherein defendant was able to get an Internal Revenue Agent to admit that he had no personal knowledge that the interest payments there in question were ever made to defendant); of Mona Riepen, Tr., vol. V, pp. 1280-83 (wherein defendant elicited from this nominee-account witness that he did pay to her certain profits from the account carried in her name); of Willard D. Snow, Tr., vol. V, pp. 1302-09 (wherein defendant brought out that the witness did not know in whose name the particular stock there in question was held nor who received the proceeds from the sale of same). One familiar with all the evidence in the trial can see that defendant was quick to point out inaccuracies in the direct testimony of the government witnesses and, as we shall observe later in this opinion, he was seldom prone to pass up the opportunity to argue with the witnesses or, if that technique failed, to testify himself.

Defendant would further have us find great significance in that he offered to stipulate into evidence all documents which the government possessed relevant to the indictment years. Frankly, we are not at all sure that defendant was serious and that this was not a grand stand play to the jury in that it was an attempt by him to put the government in the unfavorable light of having to produce witnesses from all parts of the country, at great expense to the taxpayers, merely in its attempt to oppress defendant. See Tr., vol. II, p. 312, line 25 - p. 313, line 16.

We say this because, as we observed in our opinion and order of December 29, 1960 (which order denied defendant's motion to review taxation of costs); "the timeliness of defendant's offer is subject to question. Although he had examined the bulk, if not all, of the government's documentary evidence prior to trial, defendant made no offer to stipulate at that time." Then, too, bearing in mind that defendant was aware of the nature and identity of the documentary evidence to be used against him, how can counsel indicate that the offer to stipulate was indicative

case was only concerned with the inadequate representation of a defendant by somebody, an attorney, other than himself. In that case, Lunce could find fault with an attorney; here, defendant can only find fault with himself.[9] In any event, the *Lunce* case

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of stupidity when we have not been cited to any document, other than those objected to by defendant at trial, which should not have been admitted? Finally, this Court saved defendant from himself, as it were, when it refused to coerce the government to accept the offer to stipulate. Tr., vol. II, p. 313, line 17 - p. 315, line 8.

The defendant next asserts that the instructions offered by him were wholly inadequate and that he did not object to instructions offered by the government. To begin with, the proffered instructions indicate that either defendant has legal ability far beyond that of the average layman, or else that counsel retained by him for that special purpose did not do him justice. We say this because the instructions were submitted in the style prescribed by the Local Rules of this Court and complete to the point of bearing citations to cases. With respect to the lack of objection to the government's proposals, we note that they were, in the main, accurate statements of the law, but that in the interest of doing justice to the defendant this Court labored long and hard to scrutinze carefully and to edit or to rewrite any of the government's instructions which did not give defendant his due. Finally, we would note that the true test of defendant's intelligence and alertness is whether he objected to the instructions which were ultimately proposed by this Court. In all humility we say that he could not, for the final instructions were, as we said earlier, a complete, fair and accurate statement of the applicable law.

Finally, this Court was able to observe the many other ways in which defendant demonstrated his intelligence and alertness. Whether we consider important matters such as his demand for a bill of particulars or relatively unimportant ones such as calling attention to the fact that a given document was dated incorrectly, Tr., vol. I, p. 253, line 25 - p. 254, line 11, and calling to the attention of government counsel the correct number of an exhibit. Tr., vol. IV, p. 1109, lines 18-22, the record shows that the defendant was constantly alert to protect his rights.

[9]The *Lunce* case is further distinguishable in that counsel there was not retained until the very day of the trial, 244 F.2d at 109; he represented that defendant without any preparation, 244 F.2d at 110; and he cannot be said to have been the choice of that defendant, since the trial date was at hand, the defendant had no counsel and the allegedly incompetent attorney volunteered at the very last minute. 244 F.2d at 109.

states a minority proposition, as is evidenced by a reading of the following cases: *Ex parte Haumesch,* 82 F.2d 558, 558-59 (9th Cir., 1936) (the defendant, "having been represented at the trial of his case . . . by an attorney of his own selection, cannot complain that he has been deprived of his constitutional right to be represented by counsel because the attorney so selected was, as he claims, unskillful or incompetent in the handling of the case."); *Gambill v. United States,* 276 F.2d 180, 181 (6th Cir., 1960) ("A defendant cannot seemingly acquiesce in his attorney's defense and after the trial has resulted adversely to him obtain a new trial because of the incompetency of his attorney."); *United States v. Hack,* 205 F.2d 723, 727 (7th Cir., 1953), cert. den. 346 U.S. 875 (1953); *United States ex rel. Darcy v. Handy,* 203 F.2d 407, 426 (3rd Cir., 1953), cert den. sub. nom. *Maroney v. United States ex rel. Darcy,* 346 U.S. 865 (1953); *Burton v. United States,* 151 F.2d 17, 18-19 (D.C. Cir., 1945), cert. den 326 U.S. 789 (1945); *Tompsett v. State of Ohio,* 146 F.2d 95, 98 (6th Cir., 1944), cert. den. 324 U.S. 869 (1944); *United States v. Malfetti,* 125 F.Supp. 27, 29 (D. N.J., 1954).

Defendant has hit upon quite a scheme: waive counsel, take your chances with the jury, then if the jury disappoints you, merely point out that you are a poor substitute for a lawyer, thereby gaining another trial with the concomitant chance that you will find the one juror who will keep you from paying the penalty which the law exacts. If such a maneuver were allowed "there would seldom, if ever, be a final termination of criminal charges." See *United States*

v. Hack, supra, at 727. Some court other than this one will have to sanction such a subterfuge.

V. The Defendant Was Not Denied a Fair Trial by Virtue of Comments of the Court or Government Counsel.

A. Allegedly prejudicial comments of the Court.

The defendant has gone to great lengths to cite those portions of the transcript which, he asserts, show that the Court, by its comments, prejudiced the defendant in the eyes of the jury. Before considering the specific items in question, we would only note that there never was, at any time, an intent on the part of the Court to do anything which would be calculated to harm the defendant. As this opinion has indicated already, and as we shall demonstrate shortly, the Court bent over backwards to see to it that the defendant received a fair trial.

First of all, a reading of the transcript will show that many of the allegedly improper comments of the Court were made in an attempt to remind the defendant that while examining a witness or arguing to the jury, he was acting in the capacity of an attorney. Time and time again, however, the defendant insisted on making remarks from the counsel table which, under no stretch of the imagination, could be regarded as being anything other than pure testimony on his part or, alternatively, as blatant arguing with the witness.[10] It was, of course, entirely proper for

[10]The parenthetical notation at the beginning of each of the following paragraphs refers to the page and line of defendant's memorandum which cites allegedly improper comment of the Court. We shall deal with each such citation briefly.

A. (Page 14, lines 10, 11). The witness in question had twice stated that defendant had offered to make the loan in question.

the Court to caution or to reprimand the defendant lest he continue to lapse from the role of counsel into

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Tr., vol. III, p. 792, lines 21, 24. When defendant under the guise of cross-examination, stated: "Well, you know very well I didn't offer . . ." Tr., vol. III, p. 792, line 25, the Court properly concluded that the defendant was being argumentative. Tr., vol. III, p. 793, line 1. Defendant proceeded, without hesitation, to ask: "It was you who sought the loan?" He would characterize this only as being a leading question. We believed then, and say now, that in view of the fact the witness had answered the question twice, the defendant was being argumentative, and hence it was proper for the Court to interrupt him.

B. (Page 14, line 14). Defendant by referring to remarks out of context, attempts to make it appear that the Court was interrupting the defendant as soon as he started questioning a witness. The transcript, when read in context, shows that the defendant had just argued with the witness, Tr., vol. III, p. 795, lines 20-21, and that the Court was trying to explain that he must follow proper procedure. In the midst of the Court's comment, later resumed, the defendant simply began his questioning again. Tr., vol. III, p. 796, line 6.

C. (Page 14, lines 15, 16). These two comments merely drew the defendant's attention to the fact that all along he had been testifying under the guise of cross-examination, a fact which is borne out by the transcript of this particular witness' testimony. Tr., vol. IV, p. 872, lines 5-9; p. 873, lines 3-7; p. 874, lines 16-17; p. 875, lines 1-15.

D. (Page 14, lines 27, 28). The defendant was, again, testifying; hence, the Court's comments were perfectly proper.

E. (Page 14, line 29). The Court's comment referred to the following statement of defendant after the witness' answer: "Plus the cost of the property." Although the transcript shows that a question mark followed the quoted words, the Court's remark in question clearly shows that the Court interpreted defendant's words to be a statement of fact, rather than a question. This assignment of error points up the danger of trying to gain knowledge as to the way things are spoken, from the cold, printed record. Once the Court had determined that the defendant was again testifying, it was perfectly proper to go on to remark that the defendant's statement should be stricken.

F. (Page 14, lines 31, 32). The defendant was in the process of cross-examination. His purported questions were obviously attempts to testify. Under the circumstances, the Court's cautions were proper.

G. (Page 15, line 1). Another example of defendant's testifying. Here, he explains that he merely wanted to "refresh her memory as to what [the] agreement was" between the witness and defendant. But, as the Court pointed out, the witness had already explained that. See Tr., vol. V, p. 1211, lines 7-10.

that of witness. See *Shelton v. United States,* 205 F.2d 806, 810 (5th Cir., 1953), cert. dismissed 346

H. (Page 15, line 2). The defendant had laid absolutely no foundation upon which to base a question as to the witness' knowledge of the event in question. Under the circumstances, the remarks of defendant were simple testimony.

I. (Page 15, lines 3, 4). Both of defendant's questions amounted to testimony and, in any event, at least the second question, at Tr., vol. V, p. 1282, lines 10-12, called for an opinion which the witness could not possibly give. See the witness' own disclaimer of knowledge at Tr., vol. V, p. 1281, lines 18-20.

J. (Page 15, line 8). Defendant's statement "in fact, I had quit financing Morvay" is clearly an attempt to testify.

K. (Page 15, line 14). Defendant had asked the witness whether certain statements were contradictory. The question, as phrased by defendant, indicates that the witness made the contradictory statements, whereas the record, Tr., vol. V, p. 1389, line 24 - p. 1390, line 2, shows that the statements were made by defendant to the witness. Right after the witness agreed that the statements were contradictory, defendant attempted to explain matter which is not apparent from the record, but which under any circumstances must be classified as testimony or argument. The Court then merely advised defendant as to when it would be proper to contradict the witness.

L. (Page 15, line 16). The witness had just finished giving his version of the nature of a complicated transaction. As soon as he was finished, the defendant asserted: "No, that was not the agreement." Tr., vol. VI, p. 1559, line 15. Under the circumstances, it was appropriate again to advise defendant of the proper manner to contradict witnesses.

M. (Page 15, line 18). The five-line "question", Tr., vol. VI, p. 1560, lines 17-21, was nothing other than testimony or argument, in which case it was proper for the Court to inquire of defendant whether he was arguing or questioning, and in any event, to remind him that he should ask a question.

N. (Page 15, line 19). The 11-line "question", Tr., vol. VI, p. 1562, lines 3-13, was nothing other than testimony or argument, in which case it was proper for the Court to advise defendant that it did not constitute cross-examination. The second question, eight lines long, Tr., vol. VI, lines 17-24, was part testimony, and in any event, so confusing that it was necessary, for the witness' understanding, for the defendant to break it down, as the Court directed.

O. (Page 15, line 20). The example used by defendant in his question was legitimate. But, when defendant concluded in his question "Now, there is a tax saving . . ." that is sheer testimony. Tr., vol. VI, p. 1563, line 9.

P. (Page 15, lines 22, 23). The witness had stated, Tr., vol. VI, p. 1565, line 12, that defendant had made an additional loan

U.S. 892 (1953). The defendant objects that the Court found it necessary to remind the defendant that if he desired to testify that he should take the witness stand. This argument is adequately and appropriately answered by the following observation by the Court of Appeals for the Fifth Circuit:

> "The trial court would not conceivably have tolerated the self-serving statements made by the accused and his flat denials of statements made by witnesses, and his irrelevant comments, if made by a lawyer. In fact, the criticism now levelled at the trial court for referring to the right of the

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to a third party. The defendant soon thereafter went on to "ask" whether the witness recalled that the defendant refused to make an additional loan, but was willing to buy the properties in question for a specific sum of money, and then give the third party the difference between the value of the original loan and the purchase price of the properties. Tr., vol. VI, p. 1566, lines 18-22. The Court cautioned defendant, but with complete disregard for what the Court had just said, the defendant continued: "Do you remember *that?*" Tr., vol. VI, p. 1566, line 25.

Q. (Page 15, line 24). The witness had testified that a third party had *gone* to defendant to borrow, Tr., vol. VI, p. 1569, lines 1-2, whereupon the defendant gratuitously commented: "They *did* borrow additional funds." Tr., vol. VI, p. 1569, line 3. The Court again advised defendant that he was testifying.

R. (Page 16, line 3). The defendant had been attempting to push the witness into saying that there would be "double-taxation" if the defendant had been required to pay certain taxes. On three occasions the witness testified that no "double tax" was involved. See Tr., vol. VII, p. 1743, lines 10-14; p. 1750, lines 1-2, 23-24. The defendant proceeded to argue with the witness, who had just stated that the corporation in question had not paid a tax, by asserting: "Because no tax was due." Tr., vol. VII, p. 1751, line 12. The allegedly objectionable colloquy between Court and defendant was merely an attempt to ascertain whether or not the defendant intended to examine or to testify.

S. (Page 16, line 19). The defendant attempted to relate a conversation which had taken place outside of the courtroom. A check of the transcript shows that the particular conversation had never been testified to by the witness. But, defendant was not deterred, because immediately after the Court had cautioned him, he proceeded to relate more of the conversation. Tr., vol. VII, p. 2014, line 25 - p. 2015, line 2.

> accused to testify in his own behalf arose entirely from the court's patient explanation, repeatedly made to Smith as he purported to cross examine government witnesses, that he could not argue with them or dispute them, as he repeatedly did, but that if he wanted to get his views to the jury he ought to take the witness stand. There is no merit in the contention that the court prejudiced appellant by any of such statements or by all of them taken together." *Smith v. United States,* 234 F.2d 385, 388-89 (5th Cir., 1956).

Secondly, despite the great number of cautions by the Court, the defendant often was not satisfied with merely arguing with the witnesses. He saw fit on several occasions to comment on the credibility of the witnesses during the course of his examination,[11] a

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[11]The parenthetical notation at the beginning of each of the following paragraphs refers to the page and line of defendant's memorandum which cites allegedly improper comment of the Court. We shall deal with each such citation briefly.

A. (Page 15, lines 9, 10). On three different occasions the defendant had commented on the credibility of the witness in question. Tr., vol. V, p. 1379, line 11 ("Well, you have proved yourself an astute man."). The Court ordered the remark stricken. The defendant, without hesitation, proceeded to say: "Well, you have proved very clever in . . . ." Tr., vol. V, p. 1379, line 16. The same order was given, whereupon the defendant commented: "It seems that the witness should be able to remember as to—his memory has been good as to most subjects, and it seems that he should be able to remember as to the time. . . ." Tr., vol. V, p. 1379, lines 18-21.

B. (Page 15, line 11). The defendant asked the witness whether he had failed to accede to the defendant's request for an itemization. Tr., vol. V, p. 1383, lines 5-6. The Court observed that "there is nothing in the record that you made a request for an itemization. The witness has stated you didn't." This comment was well warranted by the testimony. See Tr., vol. V, p. 1381, line 18 - p. 1382, line 9. Almost immediately thereafter, the witness stated: "I don't recall any conversation with you in which you made such a request." Tr., vol. V, p. 1383, lines 16-17. In response to that statement, the defendant observed: "Your mem-

tactic which no court need tolerate. Upon the occasions cited in paragraphs A and C in footnote number 11, the Court found it necessary to threaten to hold

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ory seems very good . . . ." Tr., vol. V, p. 1383, line 18. The Court proceeded to caution defendant not to make remarks concerning credibility. The defendant, with an innocence reserved only to angels retorted: "I am simply trying to bring out the complete and true facts." Tr., vol. V, p. 1384, lines 5-6. The Court then cautioned: "You do it according to the rules of procedure and evidence. Just because you want to be your own attorney, that doesn't mean that the bars of procedure are down and you can conduct this like you would a Piute pow-wow." On seven previous occasions the defendant had commented on credibility. See Tr., vol. III, p. 784, lines 14-15 ("Your Honor, I have never heard such a portrayal . . . ."); vol. IV, p. 988, lines 13-17 ("and then gets on the stand and testifies as he did, which he knows to be just the reverse of the truth."); vol. IV, p. 988, lines 20-21 ("When he perjures himself that way, I think . . . ."); vol. V, p. 1379, lines 11, 16, 18-21, and p. 1383, line 18. These circumstances explain why the Court felt a strong admonition was appropriate. As to the reference to a Piute pow-wow, we would only note that the expression is a colloquialism common to citizens of this State, and that it has, and was only intended by the Court to have reference to an informal and not too well organized method of conducting important business. It is similar to referring to that type of gathering which is characteristic of a town meeting, a symbolism which this Court used on another occasion. Tr., vol. VII, p. 1676, lines 13-18.

C. (Page 15, lines 30, 31). The witness in question had just testified that the money from certain accounts had all gone either to the defendant directly or to one of his various accounts. The defendant observed: "That is not a true picture." Tr., vol. VII, p. 1690, line 21. In light of prior admonitions, the defendant must be assumed to have realized that he was acting wholly outside his role as attorney.

D. (Page 16, lines 20, 21). Here, the defendant stated in his argument that he had not received any interest payments from the witness in question. Tr., vol. VIII, p. 2016, line 21. The fact is that the witness had testified exactly to the contrary. See Tr., vol. V, p. 1201, line 13 - p. 1202, line 8; p. 1208, lines 9-11. The defendant was not satisfied, so he attempted to contradict her. Tr., vol. VIII, p. 2016, lines 21-24. The Court merely tried to point out that the defendant would not be allowed to do so. However, since the defendant had seen fit to use his argument to impeach the witness, the Court thought then, and states now, that it was proper to caution the jury that, as far as the law was concerned, the witness' testimony stood unimpeached. Tr., vol. VIII, p. 2016, lines 7-10.

defendant in contempt. By the time the trial had reached those respective stages, the defendant had repeatedly violated the cautions, admonitions and directions of the Court, not only with respect to the making of disparaging remarks about the testimony of various witnesses, but also by testifying and arguing under the guise of cross-examination and by asking improper questions. The defendant is an intelligent man, and so it occurred to the Court then, as it does now, that defendant's conduct, in the face of the scores of warnings given by the Court, may well have been a deliberate attempt on the part of defendant either to make a play for the undeserved sympathy of the jury, or to antagonize the Court to the point where it would be pushed into making unjudicious comments. The Court was determined to relieve defendant of his misconceptions; there would be respect for the Court. Hence, in the only language that the Court felt that the defendant would understand, the Court threatened to hold defendant in contempt and advised him that had he been an attorney he already would have been so adjudged and sentenced.[12] We shall have occasion later to comment generally

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[12]In addition to the instances already referred to, there was one other time when the Court alluded to contempt. At that time the defendant saw fit to testify in the form of a five-line "question." Tr., vol. VII, p. 1693, lines 4-9. The government objected, but the Court allowed the question to stand. This, of course, was out of the desperation induced by the defendant's consistent attempt to testify from the counsel table. However, the Court was disinclined to allow defendant to make a complete shambles of the rules of court, hence remarked: "Don't take that as an invitation, Mr. Redfield, because the Court will do what it promised if you aren't careful. I have reached the end of my patience." In light of all that had transpired previously, the Court felt then, and holds now, that the comment was fully justified.

upon the alleged prejudice of the Court, but, in the meantime, we are of the firm opinion that, under the circumstances, it was entirely proper for the Court to speak as it did. See *Abbott v. United States,* 239 F.2d 310, 315 (5th Cir., 1956) (even imposing a fine in the presence of the jury is warranted); *People v. Knocke,* 94 Cal.App. 55, 270 Pac. 468, 471 (1928). (Because of the repetition of the offense, the appellate court sanctioned the following remark of the Court to the defendant: "If there is any more of that kind of talk, you will be in jail over Saturday and Sunday for contempt of court.").

The third category into which the assignments of alleged error fall relate to those incidents when the defendant asked a question in an improper manner—improper either because it asked for an opinion the witness was wholly unqualified to give, or because the question was confusing.[13] It needs no citation of authority for this Court to observe that such questions are not permitted. Accordingly, it was proper for the Court to caution the defendant.

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[13]The parenthetical notation at the beginning of each of the following paragraphs refers to the page and line of defendant's memorandum which cites allegedly improper comment of the Court. We shall deal with each citation briefly.

A. (Page 14, lines 25 to 26; p. 15, line 5). The defendant's question obviously called for an opinion well beyond the competency of the witnesses in question. In any event, the questions were asked during cross-examination, where it is elementary that the examiner cannot go into reputation. Finally, the questions, going as they did to reputation, were objectionable because of improper form.

B. (Page 14, line 30). The defendant has asked a question as to his reputation in improper form. The Court merely stated that the question was objectionable and the reasons why. The Court allowed the question to stand, however, and after the witness stated his answer, the Court merely asked the witness how

The fourth problem deals with that portion of defendant's argument which related to the alleged burglary of his home. It began when, after "testifying" in his argument that he had made more money in 1932 than at any other time in his life, he stated: "During the noon hour of February 29, 1952, my home was burglarized." p. 1973, lines 18-19.

Immediately government counsel objected: "If the Court please, I do not believe that the remarks of counsel [quoted above] are in evidence. I feel that he is going far afield from drawing any inferences from the evidence, but, rather, at this time is testifying." p. 1973, lines 20-23.

As we were advised by defendant's February 21, 1961 memorandum in support of the instant motion,

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he came by the information which he had related. This, of course, was proper since defendant had failed to lay a proper foundation.

C. (Page 15, line 12). The first question, Tr., vol. V, p. 1386, lines 1-5, was thoroughly unintelligible, hence the Court merely asked the defendant to make it more succinct. The second question, Tr., vol. V, p. 1386, lines 12-17, clearly asked the witness for an opinion he was not competent to give. The Court inquired whether a proper foundation had been laid. That one had not been laid becomes all the more clear when the witness later testified that he was not an expert on income tax law. Tr., vol. V, p. 1387, lines 3-5.

D. (Page 15, line 13). The question was clearly an attempt to ask the witness for an opinion which he could not possibly have given. Tr., vol. V, p. 1390, lines 5-6. The defendant then asserted that the witness had made a given statement. Tr., vol. V, p. 1390, lines 13-14. The Court quite properly observed that the witness had made an exactly contrary statement, which appears at Tr., vol. V, p. 1389, lines 17-20. Under the circumstances, the reprimand of defendant would seem fitting and proper.

E. (Page 15, line 21). The question was difficult to understand in that it compounded two distinct thoughts. Tr., vol. VI, p. 1563, line 22 - p. 1564, line 1. The Court merely inquired of the witness whether he understood, something undeniably proper.

there had been two references to the burglary by witnesses.[14] Under the circumstances, however, it was quite understandable that government counsel, the Court, and, we assume, the defendant, had overlooked them.[15]

In all of the colloquy between the Court and the defendant following the government's objection, never once did the defendant, in precise and intelligible terms, call the Court's attention to the fact that there

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[14]Mr. Hogan stated in passing: ". . . he told us, that there had been a robbery that had taken place, and some of our dividend checks were alleged to have been stolen in the robbery." Tr., vol. IV, p. 1027, lines 13-16.

Mr. Hoffenblum had been asked whether he had found any indication that securities were sold by defendant during 1958. He responded that about $45,000.00 worth had been sold at a cost of about $30,000.00. The government counsel then asked: "All right. Will you continue?" Tr., vol. V, p. 1364, lines 16-21. The witness then explained part of the Reno Brewing Co. transaction and why defendant had not reported certain Canadian dividends. Tr., vol. V, p. 1364, line 22 - p. 1365, line 17. He then went on to say: "He stated that he had complete records of all his transactions dating back to 1952, at which time his home was robbed and he said that his records were taken at that time during the robbery. That was the gist of the conversation." Tr. vol. V, p. 1365, lines 18-21.

[15]That the references by the witnesses went unnoticed likely explained by the following facts. 1) Both were passing and hearsay in character, and were not responsive to the questions asked by examining counsel. 2) Nothing was made of them at the time either by the government or by the defendant in his cross-examination. 3) The trial had been a long one—the better part of four weeks long. 4) The government had brought to the witness stand some 89 witnesses, and the defendant had produced 10 in addition. 5) The testimony alone covered some 1,713 pages of transcript. 6) The Hogan statement was made on October 13, the Hoffenblum statement was made on October 18, but the defendant's argument was not until October 27.

This Court is of the opinion that the foregoing facts demonstrate how easy it was to overlook the references to the burglary and that, at the same time, they dispel the insinuation of the defendant that the Court engaged in a calculated attempt to deprive the defendant of his due.

had been references in the testimony upon which to base his remarks. His failure to correct the Court, so that it might at that time have taken preventative steps, was, we feel, a waiver of the alleged error, if any. See *MacInnis v. United States,* 191 F.2d 157, 159 (9th Cir., 1951), cert. den. 342 U.S. 953 (1952); *United States v. Vasen,* 222 F.2d 3, 6 (7th Cir., 1955), cert. den. 350 U.S. 834 (1955); *Smith v. United States,* 216 F.2d 724, 727 (5th Cir., 1954).

In any event, we feel that there was no error in the first instance. This is because, even assuming that at the time of the incident the Court had been aware of the prior testimony, the defendant could not, under the circumstances, properly have stated more in his argument than he did.

The defendant did observe, during his argument, that his home had been burglarized, Tr., vol., VIII, p. 1973, lines 18-19; p. 2001, lines 23-24, and that "my records were lost to me." Tr., vol. VIII, p. 2001, lines 23-24, p. 2002, line 5. Bearing in mind the exact nature of the hearsay comments of the two witnesses in question, one familiar with this trial and the issues and evidence therein would have to conclude that what the defendant likely would desire to argue would be that the jury should draw the inference that the facts of burglary and the stealing of certain records accounted for his misstatement of the cost basis of the securities which he sold and which were the subject of the indictment.[16]

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[16]Our assumption is supported by the following remonstrance made by the defendant during the course of colloquy between the Court and the defendant at the time of defendant's argument to

But in no event could defendant be allowed to argue in that manner. This is because if, in fact there had been a burglary, it would not be material to the case, unless there was proof that the burglary resulted in loss of records which pertained to the stock transactions under inquiry. (1) There was no evidence whatever as to whether all his records, if any, were stolen, or part of them only. (2) There was absolutely no evidence that the records which allegedly were stolen related to the particular stock transactions in question. (3) The defendant had failed to show by testimony or otherwise that he had ever kept a record concerning the particular stock transactions which were the subject of the indictment. (4) The defendant had never introduced evidence to show that he had ever made a good-faith attempt to learn of the price at which he had purchased the securities in question. Because of the glaring lack of vital evidence, the jury could never be allowed to infer that the burglary and the stealing of certain records, if any, accounted for his misstatement of the cost basis. Accordingly, the defendant would never be permitted, under the circumstances of the record, to so argue.

Fifthly, the defendant cites us to miscellaneous colloquies between the Court and defendant. As the notation in the margin shows,[17] these comments were

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the jury: "Well, the counsel for the plaintiff has made a point, or tried to make a point, that I had not showed [sic] exact costs in some instances of securities sold." Tr., vol. VIII, p. 1978, lines 13-15.

[17]The parenthetical notation at the beginning of each of the following paragraphs refers to the page and line of defendant's memorandum which cites allegedly improper comment of the Court. We shall deal with each such citation briefly.

harmless, when read in context, and in any event, were nothing other than an attempt by the Court to

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A. (Page 15, line 8; Page 8, lines 10-18). At the beginning of his opening statement to the jury, the defendant stated: "I, of course, am not an attorney. I know absolutely nothing about the law." Tr., vol. I, p. 145, lines 9-10. He went on to observe: "Yes, and I don't feel that I need to know the law. Those who know the law may have an advantage over me, in that they might know something to do or something to say—shall we say tricks of the trade, that might . . . ." Tr., vol. I, p. 145, lines 16-19. Later on, while cross-examining a government witness, he apparently did not like the witness' answer that he, the witness, had paid a certain tax. So, he said: "That stops me, your Honor. That stumps me. * * * * I paid it." Tr., vol. III, p. 798, lines 7-21. Both instances, as they appeared in the context of the trial setting, were nothing other than attempts on the part of defendant to gain undeserved sympathy of the jury. The Court felt that it was necessary to set the record straight, as it were, so that the jury would not fear that defendant's lack of representation by counsel would result in his getting an unfair trial. After all, the defendant had determined to appear *pro se.* Since the decision was a voluntary one on his part, there was no reason to permit him to make a play for the jury. He was doing just that when, with his hands in the air and a look of chagrin on his face, he allowed as how he did not know how to handle the situation brought about by the witness' unfavorable answer. The Court's comment "I don't propose to have you impose on the jury by standing there hour after hour indicating how stupid you are or at what a loss you are at defending your own case. You had the right to have counsel. Now you chose not to have. Having chosen to represent yourself, you must assume the difficulties and the hazards, but don't weep. It was a voluntary choice on your part," was, in light of defendant's conduct, entirely proper. See in this connection, *Butler v. United States,* 191 F.2d 433, 436 (4th Cir., 1951), where the trial judge said: "but if you are not sufficiently informed as to how to try a case in this Court you will not be allowed to try it," and the Court of Appeals, in affirming the conviction, stated: "This statement was proper in view of the conduct of counsel for defense. Attorneys have an affirmative duty to conduct themselves properly before the courts. Where counsel persists in obnoxious actions, the court must be free to warn them of any such improprieties." See also *People v. Knocke,* 94 Cal.App. 55, 270 Pac. 468, 470 (1928), where the appellate court affirmed, even though the trial court had said: "I am surprised that any one who has gotten by the Bar Association examination should raise that question," and "if you cannot behave yourself in this court, you better go and practice in the police court." *c.f., People v. Schneider,* 3 Cal. App.2d 1, 39 P.2d 258, 259-60 (1934), where there was affirm-

induce the defendant to observe proper courtroom decorum.

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ance even though, after defendant stated that he would appear *pro se*, the trial court said: "You have more nerve than I have."

B. (Page 15, line 15). The cold record does not show why the Court spoke as it did. However, the Court now recalls that at the time of the incident, the defendant, by tone of voice and demeanor, was doing nothing other than "grandstanding." Indeed, this conclusion is supported by the subsequent revelation of defendant that his offer had an ulterior motive, namely, the convenience of his own witnesses. In any event, the defendant's demeanor was typical of his coy remarks which can only be described as fawning in nature. See Tr., vol. VIII, p. 1841, lines 13-18 (reference, when speaking to the Court, to "I love you.").

C. (Page 15, lines 25-27). The witness in question had originally been called as a government witness on October 11, 1960. During the course of defendant's cross-examination, there was a question as to whether the witness had a certain tax receipt. At that time, the Court ordered the witness to bring the item to court. Tr., vol. III, p. 799, line 16. The record shows that on October 21, 1960, the witness was produced as a witness on behalf of the defendant. Tr., vol. VI, p. 1604, lines 8-10. The allegedly improper remarks addressed to defendant were occasioned by the fact that although, by his own admission, Tr., vol. VI, p. 1611, lines 14-25, the defendant had himself found the item in question the very night of the Court's order to the witness, the defendant waited ten days to advise the Court of such fact, thereby sending the witness, with the sanction of the Court, on a wild goose chase. The reprimand, Tr., vol. VI, p. 1612, lines 6-11, 14-18, 22-23, was entirely proper, and, if anything, should have been stronger. This particular instance of the defendant's lack of respect for the Court has nothing at all to do with the defendant's attempt to impeach a government witness.

D. (Page 15, lines 28-29). Initially, it will be observed that at this particular stage of the trial, the witness had already become a witness for the defendant. Tr., vol. VI, p. 1604, lines 8-10. The dispute in question was who, the witness or the defendant, had paid a certain tax, and who supplied the funds for the payment. The Court observed that there was no question but that defendant had paid money to the Internal Revenue Service. (He does not complain about that comment.) But, that was not the same thing as saying that, as the defendant would have had us believe, that it was the defendant's money. In line with the well-established proposition that a federal judge may comment on the evidence already adduced, the Court merely commented that the fact that the defendant paid money to Internal Revenue did not "wipe out this witness' testimony, as I have listened to it. His position is that he may have paid you the amount of money."

Finally, the defendant asserts the related points that, on the one hand, the Court "continuously inter-

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Tr., vol. VI, p. 1614, lines 7-9. This comment of the Court was amply supported by the witness' prior testimony, which appeared at Tr., vol. VI, p. 1607, lines 17-19. There was therefore, no attempt to "improperly underwrite the credibility of a witness for the plaintiff."

E. (Page 16, line 1). In this instance, the government was attempting to introduce into evidence the original ledger of a witness who had previously been called in behalf of the defendant. The defendant objected to its admission on the ground that a government agent was familiar with its contents and that it "just seems asinine to me to deprive the McCues . . . ." Tr., vol. VII, p. 1713, lines 8-13. The Court, with a calmness not justified by defendant's conduct, merely stated: "You will have to change your vocabulary if you are going to be a lawyer. You don't intimate that anyone is asinine in court." Tr., vol. VII, p. 1713, lines 14-16. What is prejudicial about that?

F. (Page 16, line 2). In this instance the government had just completed a thorough examination of a witness. The witness was excused, and the Court asked the defendant whether he then wished to resume his cross-examination of another witness, the government's expert. The defendant, with a dismaying obliviousness to the Court's question, and with obvious reference to the government's just concluded examination, said: "I hope I can take lessons from counsel and learn to say so much about nothing." Tr., vol. VII, p. 1735, lines 10-11. The Court, refusing to let go unchallenged the defendant's uncalled for slur upon the able United States Attorney, simply responded in kind. Actually, the defendant should have been cited for contempt.

G. (Page 16, lines 22, 23). We join together these two allegations of error, for they show the nature of some of the defendant's thoroughly uncalled for remarks. On one occasion the defendant stated during the course of his argument to the jury: "but counsel yesterday would make an issue of that to show how small I was—not half as small as the men I have told you about, the little men in big places in Government." Tr., vol. VIII, p. 2020, lines 11-14. Of course, the defendant could have been referring to anybody from the President to government counsel, or from Internal Revenue agents to the Court itself. The Court merely said: "Well, let's just define that a little further, because, as the Court has pointed out, the Court is making a record also. Now, who do you mean by the 'little men in big places?'" Tr., vol. VIII, p. 2020, lines 15-18. The second of defendant's remarks came shortly thereafter. He observed that certain Internal Revenue agents "are even a discredit to themselves." Tr., vol. VIII, p. 2021, lines 17-18. The Court merely observed that it had already cautioned defendant not to make remarks disparaging the

rupted and belittled" the defendant "even though no objection had been interposed by two able and experienced Trial Counsel representing the plaintiff," and, on the other hand, that counsel for the government "were accorded every courtesy and consideration by the Court." In the first place, as we have suggested already and as we shall go on to discuss presently, the Court did not caution or reprimand the defendant except on those occasions when he was fully deserving of such. Secondly, there is nothing at all to show that the Court "belittled" the defendant. Thirdly, although the record is incapable of showing it, the occasions were many when the government counsel were on their feet, ready to make an objection which was never stated. When the misconduct of defendant was so obvious, there would have been little reason for the Court to delay its ruling until the government fully stated its position. In any event, the defendant's conduct, carried on as it was in the face of repeated explanations, cautions and reprimands of the Court, constituted nothing other than a challenge to the authority of the Court itself. Under such circumstances, we see no reason at all why the Court had to wait for objection by the government. Fourthly, as the notation in the margin indicates, there were innumerable times when the Court allowed defendant to

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character of anyone. At this time, the Court refuses to further dignify the two incidents by making additional comment.

H. (Page 16, line 24). The defendant had seen fit to inject into his argument to the jury a supposedly humorous story which we assume had no basis in fact. Whether it did or not, the fact is that the defendant was attempting to ridicule or poke fun at government agents, a device which would not be tolerated.

proceed, without reprimand, although he was violating rules of evidence, procedure, or the Court.[18]

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[18]The following citations to the transcript are by no means to be thought of as exhausting the instances where the Court refrained from compelling defendant to comply with the ordinary rules of evidence or of Court.

Vol. III: Page 829, line 24 - p. 830, line 5.

Vol. IV: Page 878, lines 4-12, 14-19; p. 892, lines 11-18; p. 1113, lines 9-15.

Vol. VI: Page 1590, lines 2-7; p. 1604, line 23 - p. 1605, line 14; p. 1631, lines 18-21; p. 1649, lines 6-8.

Vol. VII: Page 1694, line 25 - p. 1695, line 9; p. 1701, line 25; p. 1704, lines 20-23; p. 1715, lines 8-15.

Vol. VIII: Page 1970, line 16 - p. 1971, line 8 ("Counsel for the Government put on quite a show yesterday. Mr. Maxwell, the performer, reminded me of an incident in my childhood. You ladies and gentlemen, of course, know what a chameleon is, a lowly lizard-type animal, which can change color at will. **** You could pick it up and place it with its surroundings, and it would immediately change color and blend with the surroundings. Just so was Mr. Maxwell's testimony yesterday. [Note: Mr. Maxwell never testified]. He tried to make you believe that black was white; that white was black."); p. 1972, line 21 - p. 1973, line 17 during his argument, defendant related that he had moved from California, and why, and that he was making a fortune during the depression); p. 1935, lines 21-22 ("Counsel was wrong again. I do not propose to ever cash those checks."); p. 1987, lines 1-12 (comment, during argument, as to how three Presidents had permitted the public debt to increase); p. 1990, lines 6-7 (testifying in argument: "I do know that I did not receive any of it."); p. 1993, lines 7-13 ("The large exhibit 265, could just as well have been portrayed on an ordinary letter sized sheet of paper, but, no, that would not create quite the impression that the larger sized sheet would, and two, it would be too economical for those in charge of spending taxpayer's dollars, just as men brought from the four corners of this nation to put dividend checks in evidence. . . ."); p. 1994, lines 9-13 ("Now, that is what I refer to, ladies and gentlemen, when I say there is something wrong with those who hold the purse strings to spending of our taxpayers' dollars. The Canadian Government would never do such as that. That is the height of stupidity. It is a waste of money."); p. 1996, line 22 - p. 1997, line 1 ("For some reason or other the Internal Revenue Service has not approved a single tax return filed since the date of my robbery in 1952 although they had always approved settlements up to that date. Maybe the agent who has sat here all through the trial with a smirk on his face could give you the answer."); p. 1998, line 25 - p. 1999, line 3 ("Well, you know, she was ob-

Nor, is there any merit to the allegation that the Court showed favoritism to the government counsel. The fact is, of course, that they presented their case in a generally unreproachable fashion. However, as the notation in the margin shows, there were many government-fostered objections which were overruled, and when government counsel made an objectionable remark in his argument, the Court was quick to correct the record and admonish the jury carefully.[19]

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viously disturbed here and, I don't know, maybe it is because she has reached the ripe old age of thirty-one and has never known the thrill of holding hands with one of the opposite sex."); p. 2010, line 16 - p. 2011, line 4 ("You know, only last night I received a telephone call from a man who told me of many incidents he knew of where the Government agents had intimidated people to make them pay taxes they did not owe, and of cases where refunds were due the taxpayer, but refused by the Government, because the Government knew full well that it would cost these persons more to obtain it than would be represented by the refund."); p. 2012, lines 7-11 ("Well, counsel for the Government must think you jurors stupid and cannot see through their unsavory tactics. They will discover that you are intelligent and alert and capable of seeing through the smoke screen they unceasingly try to lay before you."); p. 2024, lines 10-13 ("Our counsel for the Government yesterday—which I liken to a chameleon—tried to change the color, distort and color things differently than they exist, in an effort to influence this jury."); p. 2024, line 16 - p. 2025, line 23 (reads newspaper article that attempts to make a mockery of tax system.).

[19]The following citations to the transcript are by no means to be thought of as exhausting the instances where the Court either gave rulings unfavorable to the government or otherwise made comments adverse to government counsel.

Tr., vol. I, p. 72, line 20 - p. 73, line 5; Tr., vol. II, p. 415, lines 11-12; Tr., vol. II, p. 552, lines 20-21 ("Well, counsel, isn't that in effect carrying coals to Newcastle?"); Tr., vol. III, p. 788, lines 19-20 (objection overruled); Tr., vol. III, p. 830, lines 2-5 (same); Tr., vol. IV, p. 878, lines 17-19 (same); Tr., vol. IV, p. 890, lines 1-5 (same); Tr., vol. IV, p. 898, lines 24-25 ("Now, that may satisfy you, counsel, but I would like to have a date on that."); Tr., vol. IV, p. 961, lines 10-14 (objection overruled); Tr., vol. IV, p. 1113, lines 12-15 (same); Tr., vol. V, p. 1284, lines 11-14 (same); Tr., vol. VI, p. 1575, lines 2-5 (same); Tr., vol. VI, p. 1583, lines 1-2 (same); Tr., vol. VI, p. 1590, lines

Before stating a few of the general principles of law which we believe are appropriate to this general problem, we will note initially that the fact that the attack is leveled on the Court, however much the Court would prefer not to pass upon the issues, does not relieve the Court of the duty to do so; otherwise, the granting of the motion for new trial under such circumstances would be automatic and remove discretion from the Court. As we pointed out at the beginning of this opinion, such is not the rule.

Although defendant has labored mightily to point out the alleged indiscretions of the Court, we think it important to observe that the "questions and comments of the court must be read in their context and viewed with a perspective of the whole proceedings." *Ochoa v. United States,* 167 F.2d 341, 344 (9th Cir., 1948); *Todorow v. United States,* 173 F.2d 439, 448 (9th Cir., 1949), cert. den. 337 U.S. 925 (1949); *United States v. Thayer,* 209 F.2d 534, 536 (7th Cir., 1954) ("Words of the trial judge are not to be isolated for assessment. [citing the *Ochoa* case, *supra*]. Nor are specimens of his comments to be wrested out of context and measured against those intriguing generalities cited to us from various cases by defendant. While there is no single formula for guaging judicial discretion such contentions as raised by this defendant

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6-7 (same); Tr., vol. VII, p. 1726, lines 16-19 ("Counsel, that isn't exactly the testimony of the witness."); Tr., vol. VII, p. 1927, lines 10-18 (admonition to jury to disregard remarks made by government counsel during his argument to jury); Tr., vol. VIII, p. 2010, line 23 - p. 2011, line 4 (refusal to order remarks of defendant stricken); Tr., vol. VIII, p. 2013, lines 14-16 (same).

must be resolved in an environment supplied by the full record.'') ; *United States v. Warren,* 120 F.2d 211, 212 (2d Cir., 1941) (where Judge Learned Hand observed that "separate passages cut from their context and from the trial as a whole, often have an apparent importance which in fact they do not deserve) ; *United States v. Lee,* 107 F.2d 522, 529-30 (7th Cir., 1939), cert. den. 309 U.S. 659 (1939) ; *Goldstein v. United States,* 63 F.2d 609, 614 (8th Cir., 1933) ; *Hargrove v. United States,* 25 F.2d 258, 262 (8th Cir., 1928).

What, then, does the record show? Almost from the beginning, and certainly right up to the end, the defendant was, as we have already pointed out, engaged in a pattern of conduct that can only be described as contemptible. This, after all, was an intelligent defendant who had made a veritable fortune by use of his mind and cunning. It is inconceivable that he did not understand the repeated explanations, cautions and reprimands of the Court. Yet, time after time, after time, he proceeded to ignore the Court and to display an utter contempt for it. Nothing better illustrates defendant's approach than his demeanor during that part of the argument concerning the alleged burglary of his home.[20] It was not only the things the defend-

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[20]The following colloquy begins at Tr., vol. VIII, p. 1974, line 21 and ends at p. 1975, line 19:

"The Court. There was no testimony, as I understand, concerning any fire [burglary] any place. If there is to be testimony, in fairness, the Government has the right to cross-examine, just the same as you had the right to cross-examine the Government witnesses. So, if you desire to bring in testimony of a fire [burglary] you should have done that through witnesses and the Government would have the right to cross-examine those witnesses. That was not done.

ant did or said; it was also the manner in which he did them. One minute he would listen to the Court, and then he would arrogantly do exactly that which he was told not to do. One minute he would grin either to the jury or to the Court in a supercilious manner, and the next he would engage in biting sarcasm. The printed page does not show this; but, nobody at the trial will deny that that is what the Court faced.

The patience of the Court was sorely tried. It did its level best to restrain itself and, at the same time, preserve a certain semblance of courtroom decorum. If, upon occasion, the Court did not "choose [its] diction with the nicety of a Field or Marshall," *People v. Knocke,* 94 Cal.App. 55, 270 Pac. 468, 471 (1928), we still "must not overlook the fact that the human element cannot be entirely eliminated from the trial of lawsuits." *Goldstein v. United States,* supra, at 613. We doubt that but very few judges have such thick hides that they can relegate themselves to the status of automatons. Nor should they.

"Mr. Redfield. Well, your Honor, what I was about to say——

"The Court. Now, please don't argue with me. I just made a statement to you. You understand what I said.

"Mr. Redfield. Well, the New York Times stated that it was the greatest robbery of all times——

"The Court. That is all right.

"Mr. Redfield. ——including the Brink's robbery.

"The Court. Just a second, I want the record to show that you have deliberately and quietly and composedly listened to this Court advise you as to the proper scope of argument to the jury, and in that comment to you the Court pointed out that it had gone over the same subject with you in chambers. [See Tr., vol. VII, page 1890, line 1 - p. 1892, line 16.] I want the record to show that after you listened, apparently respectfully, as soon as the Court had ceased its comment to you, in one rush of words you blurted out just exactly the thing the Court was telling you could not be used in argument."

But the defendant would now have us isolate the several reprimands given by the Court and then find that he was prejudiced thereby. This we refuse to do.

> "Merely because a statement is made or question asked by court or counsel in the heat of a spirited trial which subsequently in the cool ivory tower of appellate court chambers seems inappropriate, does not make the stating nor the asking prejudicial error." *Bush v. United States,* 267 F.2d 483, 488 (9th Cir., 1959).

At least the case law is clear: in determining whether the comments of the Court were prejudicial, we may take into account the fact that it was the defendant who provoked them. *Butler v. United States,* 191 F.2d 433, 436 (4th Cir., 1951) ("Where counsel persists in obnoxious actions, the court must be free to warn them of any such improprieties."); *United States v. Dennis,* 183 F.2d 201, 225-26 (2d Cir., 1950), affirmed 341 U.S. 494 (1951) (the leading case on the subject, wherein Learned Hand, J., noted: "The record discloses a judge, sorely tried for many months of turmoil, constantly provoked by useless bickering, exposed to offensive slights and insults, harried with interminable repetition, who, if at times he did not conduct himself with the imperturbability of a Rhadamanthus, showed considerably greater self-control and forbearance than it is given to most judges to possess."); *United States v. Liss,* 137 F.2d 995, 999 (2d Cir., 1943), cert. den. 320 U.S. 773 (1943); *Moore v. United States,* 132 F.2d 47, 57 (5th Cir., 1942), cert. den. 318 U.S. 784 (1942); *United States v. Lee,* 107 F.2d 522, 529-30 (7th Cir., 1939), cert. den. 309 U.S.

659 (1939); *Hargrove v. United States,* 25 F.2d 258, 262 (8th Cir., 1928); *Magen v. United States,* 24 F.2d 325, 329 (2d Cir., 1928), cert. den. 277 U.S. 595 (1928).

Furthermore, as evidence of the fact that the Court's comments did not prejudice the defendant, we would note that he was not "disabled in any way from doing his duty. * * * He made no claim to be disconcerted. He continued to conduct the trial with his accustomed vigor and skill." *Steinberg v. United States,* 162 F.2d 120, 123-24 (5th Cir., 1947), cert. den. 332 U.S. 808 (1947). In addition, it will be noted that there is no evidence whatever that the Court "expressed even indirectly any opinion as to the guilt of the accused." *United States v. Liss, supra,* at 999.

Of great significance, too, is the fact that the Court carefully instructed the jury as to the reasons for its admonitions to counsel, and specifically cautioned the jury that it was to draw no inferences therefrom.[21] In

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[21]The following instruction appears at Tr., vol. VIII, p. 2076, line 10 - p. 2077, line 4:

"It is the duty of the Court to admonish an attorney who, out of zeal for his cause, does something which is not in keeping with the rules of evidence or procedure. You are to draw no inference against the side to whom an admonition of the Court may have been addressed during the trial of this case.

"By such remarks this Court did not then and does not now intend to favor one party against the other, or to intimate to the jury what weight they should give to the evidence or what degree of credibility they should give to the respective witnesses, or to disparage in any degree any of counsel or the defendant acting as his own attorney. As to any such remarks of the Court addressed to LaVere Redfield you are to consider them to have been addressed to him as an attorney in the case—his own attorney—and not to him as the defendant in the case.

"Such remarks and comments as the Court addressed to counsel and defendant as his own attorney were for the sole purpose of enforcing the rules of evidence and procedure, and

light of this instruction, it is impossible to see how the comments of the Court prejudiced the defendant.

"We have carefully examined the trial record and as a result we do not believe that these comments between court and defense counsel so misled and prejudiced jurors that they became partisans of the prosecution. We cannot abandon our faith in the capacity and desire of a Federal jury to avoid being mired in irrelevancies, and the record does not reveal that the jurors in the case lost or discarded their innate sense of fair play and were inspired to render a verdict not based entirely on the evidence admitted by the court.

"This conclusion is fortified and emphasized by the important fact that the court gave specific instructions to the effect that jurors must wholly disregard court rulings and comments during the trial; that because the court had admonished and reprimanded counsel in connection with the conduct of the trial, the jury should not draw any inferences from the remarks or comments or rulings of the court on those occasions that the court was intending to convey to the jury in any manner whatsoever its view or opinion as to what the verdict should be—that (such) comments of the court were only pursuant to the power and duty of the court to supervise the trial and expedite it—that (any) admonitions or reprimands were matters only between the court and the attorneys and that they cannot and must not reflect in any manner upon the guilt or innocence of the defendants.

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for the purpose of maintaining courtroom decorum during the course of the trial."

> "These unambiguous and eminently fair instructions reach straight down into the very heart of the problem posed by appellant's contentions. If any member (or members) of the jury had felt the slightest uncertainty as to the possible attitude of the judge, these blunt admonitions were sufficient to lay any doubt at rest." *Shockley v. United States,* 166 F.2d 704, 712 (9th Cir., 1948), cert. den. 334 U.S. 850 (1948).

See, in this connection, *United States v. Angelo,* 153 F.2d 247, 252 (3rd. Cir., 1946) ("Whatever unfavorable impression the jury may have received from certain of his remarks, the charge to the jury swept it away.").

Finally, we would point out that the evidence of defendant's guilt was so overwhelming that the comments of the Court were not such "as to cause a verdict to be rendered against [defendant] which otherwise would not have been found by the jury. *Gariepy v. United States,* 220 F.2d 252, 264 (6th Cir., 1955), cert. den. 350 U.S. 825 (1955). See also *United States v. Wheeler,* 219 F.2d 773, 778 (7th Cir., 1955), cert. den. 349 U.S. 944 (1955); *United States v. Lee,* 107 F.2d 522, 529-30 (7th Cir., 1939), cert. den. 309 U.S. 659 (1939); *Addis v. United States,* 62 F.2d 329, 331 (10th Cir., 1932), cert. den. 289 U.S. 744 (1933); *Magen v. United States,* 24 F.2d 325, 329 (2d Cir., 1928), cert. den. 277 U.S. 595 (1928). It is well established, of course, that in determining whether there has been prejudicial error, we may consider that, even had the error, if any, not been committed, the jury would have found defendant to be guilty in light of

the overwhelming amount of virtually uncontradicted evidence against him. See *Lutwak v. United States,* 344 U.S. 604, 619 (1953); *Thomas v. United States,* 281 F.2d 133, 136 (8th Cir., 1960); *Homan v. United States,* 279 F.2d 767, 771 (8th Cir., 1960), cert. den. 364 U.S. 866 (1960) ("Errors of the trial court which may be prejudicial in a close criminal case, in the sense of being capable in such a situation of possibly affecting the result, can well be without any such rational possibility in a strong case, and thus not entitle the defendant to a reversal of his conviction."); *United States v. Sheba Bracelets, Inc.,* 248 F.2d 134, 145 (2d Cir., 1957), cert. den. 355 U.S. 904 (1957); *United States v. Spadafora,* 181 F.2d 957, 959 (7th Cir., 1950), cert. den. 340 U.S. 897 (1950); *Ippolito v. United States,* 108 F.2d 668, 671 (6th Cir., 1940); *Fitter v. United States,* 258 Fed. 567, 573 (2d Cir., 1919); *Johnson v. United States,* 215 Fed. 679, 685 (7th Cir., 1914); *compare Berger v. United States,* 295 U.S. 78, 89 (1935); *United States v. Carmel,* 267 F.2d 345, 347 (7th Cir., 1959).

B. Allegedly prejudicial argument of government.

The defendant also urges that he was denied a fair and impartial trial by virtue of the closing argument of the United States Attorney. The brief remarks in question are set out in full below.[22] A reading of them,

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[22]The following appears at Tr., vol. VIII, p. 2026B, line 18 - p. 2027, line 9:

"May it please the Court, ladies and gentlemen of the jury:

"I want you to know that I will not give dignity to the remarks of Mr. Redfield by responding to them. I have some fifteen pages of notes taken during the course of those remarks. They will be discarded.

particularly in light of the defendant's argument,[23] reveals that there was nothing whatsoever which was

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"Ladies and gentlemen, this is a nation of law, not of men. It would appear that this financial baron of Mount Rose is above the law. He has shown an arrogant contempt for my office, of this Court, of the United States and its many institutions. I am disgusted and indignant by his conduct here in court today, and for him I must apologize to the Court and to this jury.

"You are called upon to render your verdict on the evidence and the testimony adduced at this trial, nothing else. I ask only one thing, that you do justice to this defendant, that you do justice to the United States."

[23]In addition to the examples set out in footnote 18, we cite the following passages from the defendant's argument:

Tr., vol. VIII, p. 1994, lines 15-17 ("One of the Government men has boasted that those costs [of defendant's trial] to date have run in excess of $50,000.00 he believes."); p. 1995, lines 5-9 ("I guess it is just the habit these men have and the way that—the habit they have fallen into in spending taxpayers' dollars; the habit of spending the funds of this nation of these taxpayers with reckless abandon."); p. 2007, lines 17-20 ("You know, Mr. Morvay was subpoenaed by the plaintiff to testify in this case. Why was he not put on the stand? You know, Morvay was scheduled to be indicted by the grand jury for using the mails to defraud."); p. 2008, lines 5-6 ("The reason doesn't speak well of those in public office, some of them, too—"); p. 2008, lines 11-14 ("Well, anyway, in this Government we do have some little men serving in big jobs, little men who are so small that they would have to stand on a soap box to stroke the fur on the back of a common house cat."); p. 2009, line 1 ("You know, some of the two-bit employees—"); p. 2009, lines 10-17 ("The Court. That is what I thought you said, Mr. Redfield. Is that a correct transcription of your first [and just quoted supra] statement? Mr. Redfield. Yes. The Court. Go ahead. Mr. Redfield. ——who are in the Internal Revenue Service—the Service of Eternal Revenue—would not hesitate to put an innocent man behind prison bars if, by so doing, it would serve a promotion in his own job."); p. 2012, line 24 - p. 2013, line 7 ("Mr. Redfield: Thank heaven I live in a country where I do not have to sit by and put up with the Gestapo tactics, and which do not have to be endured by any of us; where I can at least be judged by at least twelve men and women of my equal. If such is allowed to continue none of us is safe; none of us will be able to tell when he will be next. The Court: If what is allowed to continue? Mr. Redfield: The tactics of the Revenue Service. You don't know when you might be singled out for special treatment."); p. 2020, lines 11-14 ("but counsel yesterday would make an issue of that to show how small I was—not half as small as

"intended to inflame the jury against the defendant." The United States Attorney spoke in a calm, deliberate manner. Nothing was said which, under the circumstances, possibly could prejudice the defendant. There was no error in allowing the remarks to stand.

VI. There Was No Error in the Supplemental Instruction as Given by the Court.

Defendant also complains that this Court erred when it gave the jury a supplemental instruction midway through its deliberations. Specifically, defendant objects to this Court's failure to include in the so-called *Allen*-type instruction a reference to the rules that the defendant is presumed to be innocent and that the government must prove guilt beyond a resonable doubt. The instruction in question appears at Tr., vol. VIII, p. 2103, line 1 to p. 2104, line 22.

Initially, we hasten to point out that defendant has waived his right to raise this particular allegation of error. This is because, in conformity with the practice as set out in Rule 30, Federal Rules of Criminal Procedure, this Court specifically inquired of both parties whether they had any objections to the instruction as given, and the defendant, as well as the government, responded in the negative. Tr., vol. VIII, p. 2105, lines 1-20. Since, as we have indicated earlier, defendant should be given no special advantage because he appeared *pro se*, he comes within the well-established general rule that failure to object to an instruction

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the men I have told you about, the little men in big places in Government."); p. 2021, lines 16-18 ("but there are a few which certainly are not a credit to their fellow employees; they are even a discredit to themselves.").

results in a waiver of the right to assign that instruction as error. See *Cooper v. United States,* 282 F.2d 527, 534 (9th Cir., 1960); *Ryan v. United States,* 278 F.2d 836, 839 (9th Cir., 1960); *Harris v. United States,* 261 F.2d 897, 902 (9th Cir., 1958); *Davenport v. United States,* 260 F.2d 591, 595 (9th Cir., 1958), cert. den. 359 U.S. 909 (1959); *Pool v. United States,* 260 F.2d 57, 66 (9th Cir., 1958).

Quite aside from this procedural defect in defendant's position, however, we are also of the view that there is no merit to his position as a matter of substantive law. This is mainly because we are unimpressed with defendant's implicit argument that just because some courts have chosen to give an instruction in a given form, it is error to depart therefrom.

As the transcript demonstrates, the language used by this Court was significantly different from that condemned in the case which defendant cites, *Billeci v. United States,* 184 F.2d 394, 399 (D.C. Cir., 1950). It is, therefore, inapposite.

More importantly, the defendant's very argument was brought to the attention of the Court of Appeals for the Fourth Circuit, but rejected in the case of *Orton v. United States,* 221 F.2d 632, 635-36 (4th Cir., 1955), cert. den. 350 U.S. 821 (1955). There, Chief Judge Parker observed:

> "Complaint is made, too, that the judge did not repeat his charge on presumption of innocence and reasonable doubt when giving the supplemental instruction; but we think he could very well assume that the jury had in mind instructions

> which he had given only an hour and a half before. Jurors should be given credit for having ordinary intelligence; and if there is one doctrine of the criminal law which they probably understand better than any other it is the presumption of innocence and the burden resting upon the prosecution to establish guilt beyond a reasonable doubt. Nothing said in the supplemental charge had any tendency to becloud this doctrine and there was no reason to repeat what had been said plainly with regard thereto."

In addition to the fact that upon giving the supplemental instruction the Court suggested to the jury "that you again retire and carefully consider all of the evidence in the light of the Court's instructions, a copy of which you have with you," Tr., vol. VIII, p. 2104, lines 17-19, those instructions made clear reference to the presumption of innocence and/or the requisite burden of proof on at least thirteen different occasions, and two of the instructions dealt at length with the subject.[24]

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[24]The following references are all to Tr., vol. VIII: Page 2039, lines 20-23 (each element must be proved beyond reasonable doubt); p. 2042, lines 14-18 ("If, upon consideration of the evidence, you find beyond a reasonable doubt that the total taxable income . . . was willfully understated in a substantial amount with specific intent to evade . . . ."); p. 2042, lines 23-25 (reasonable doubt that the offenses were committed on certain dates); p. 2043, lines 5-6 (must prove act and intent beyond reasonable doubt); p. 2043, lines 8-12 (willfully unreported income beyond reasonable doubt); p. 2043, line 14 - p. 2044, line 13 (lengthy instruction setting forth presumption of innocence, burden of proof is on government, and concept of reasonable doubt); p. 2044, lines 14-17 (reasonable doubt defined); p. 2044, lines 18-19 ("The Government must prove every element of each offense charged beyond a reasonable doubt."); p. 2046, lines 17-18 (law presumes that person is innocent of crime or wrong); p. 2051,

Finally, we would cite those cases where the various Courts of Appeals, including our own, have approved the *Allen*-type instruction even though it did not contain references to reasonable doubt. *Suslak v. United States,* 213 Fed. 913, 919 (9th Cir., 1914); *Sikes v. United States,* 279 F.2d 561, 562 (5th Cir., 1960); *Kleven v. United States,* 240 F.2d 270, 273 (8th Cir., 1957) (opinion by the now Mr. Justice Whittaker); *Johnson v. United States,* 5 F.2d 471, 476 (4th Cir., 1925), cert. den. sub. nom. *Eick v. United States,* 269 U.S. 574 (1925); *Shaffman v. United States,* 289 Fed. 370, 374 (3rd Cir., 1923) (also noting, at p. 375, that "the trial judge, however, is vested with a wide latitude of discretion.").

VII. Conclusion.

The gist of defendant's reasons in support of his motion is that the Court, by action (or failure to act) and by comment so prejudiced the defendant that he is deserving of a new trial. As we pointed out at the beginning of this opinion, the burden was on him to sustain the proposition. This he has not done. This is because, even as an abstract proposition, we fail, in all humility, to find any error. But, even assuming solely for purpose of argument, that there were errors, we think it appropriate to note the statement of the Supreme Court in *Lutwak v. United States,* 344 U.S. 604, 619 (1953): "A defendant is entitled to a fair

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lines 1-4 (requisite intent must be proved beyond reasonable doubt); p. 2056, lines 3-14 (reasonable doubt that defendant did the acts charged); p. 2058, lines 14-23 (fraud beyond reasonable doubt); p. 2071, lines 5-10 (intent to evade beyond reasonable doubt).

trial but not a perfect one." That he received a fair trial is fully demonstrated by the record taken in context and as a whole. Having chosen, in a competent, intelligent and understanding manner, to defend himself, he proceeded to set himself apart from, if not above, the law. No court need tolerate such conduct. He insists on another trial despite the overwhelming evidence of his guilt, because this Court did not accord to him special privileges which were not his due. "Surely judges did not win their freedom from the crown only to lose it to those who set themselves against the sovereign." *United States v. Christakos,* 83 F.Supp. 521, 525 (N.D. Ala., 1949), affirmed sub. nom. *Woolard v. United States,* 178 F.2d 84 (5th Cir., 1949).

The interest of justice will not be served by the granting of a new trial. The motion will be denied.

VIII. Order.

It is the ORDER of this Court that the defendant's motion for a new trial be, and the same hereby is, denied.

Dated at Las Vegas, Nevada, this 23rd day of March, 1961.

JOHN R. ROSS,
United States District Judge

No. 17,317

United States Court of Appeals

For the Ninth Circuit

LAVERE REDFIELD,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Nevada

APPELLANT'S REPLY BRIEF.

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Table of Authorities Cited

No. 17,317

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APPELLANT'S REPLY BRIEF.

On May 11, 1961, the United States Court of Appeals for the Second Circuit decided the case of *United States of America, Appellee, v. Francis J. De Sisto, Appellant,* 289 F. 2d 833. In the *De Sisto* case, the Appellant was convicted in the trial Court of obstruction of interstate or foreign commerce, and he appealed. The Court of Appeals for the Second Circuit reversed the conviction on the ground that extensive questioning of witnesses and defendant himself, by the District Court Judge, and repeated belittling by trial Judge of efforts to establish an alibi, improperly conveyed the impression of the Court's

belief in defendant's probable guilt which could not be cured by instructions.

The Circuit Court of Appeals, speaking through Judge J. Joseph Smith, in reversing the trial Court, stated:

> "A trial judge in criminal, as in civil cases, may, indeed must, be more than a mere moderator or umpire in a contest betweeen two parties in an arena before him. He should take part where necessary to clarify testimony and assist the jury in understanding the evidence and its task of weighing it in the resolution of issues of fact. United States v. Curcio, 2 Cir., 279 F.2d 681; Knapp v. Kinsey, 6 Cir., 232 F.2d 458, 465. He must not, however, usurp the functions either of the jury or of the representatives of the parties and must take care not to give the jury an impression of partisanship on either side. United States v. Curcio, supra, 279 F.2d at page 685; United States v. Brandt, 2 Cir., 196 F.2d 653. Counsel on this appeal make much of the number and percentage of questions asked by the judge in this trial. (Prosecutor's questions of all witnesses 1381, all defense counsel 3330, Court 3115. Prosecutor's questions of defendant DeSisto 347, defense counsel 201, Court 306.) It is indeed an impressive proportion, but no such mathematical computation is of itself determinative. However, taking all this in conjunction with the long and vigorous examination of the defendant himself by the judge, and the repeated belittling by the judge of defendant's efforts to establish the time that Fine left the pier, we fear that in its zeal for arriving at the facts the court here conveyed to the jury

> too strong an impression of the court's belief in the defendant's probable guilt to permit the jury freely to perform its own function of independent determination of the facts. United States v. Brandt, supra, 196 F.2d at page 656. We do not feel that it was possible to remove the impression by the instructions given in the charge. We are constrained therefore to reverse the conviction of DeSisto and remand for a new trial."

The Circuit Court of Appeals, in the *De Sisto* case, cited *United States v. Brandt,* 196 F. 2d 653. In the *Brandt* case the defendants were convicted of using the mails to defraud, and they appealed. The Circuit Court of Appeals for the Second Circuit reversed the decision of the trial Court on the grounds that the conduct of the trial Judge during the trial of said case had improperly departed from that impartial attitude to which all defendants are entitled.

The Circuit Court of Appeals, through Judge Clark, in reversing the trial Court, stated:

> "A trial judge conducting a case before a jury in the United States courts is more than a mere 'moderator,' Quercia v. United States, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321; Montrose Contracting Co. v. Westchester County, 2 Cir., 94 F. 2d 580, 587, certiorari denied Westchester County v. Montrose Contracting Co., 304 U.S. 561, 58 S. Ct. 943, 82 L.Ed. 1529, but he is decidedly not a 'prosecuting attorney,' United States v. Guertler, 2 Cir., 147 F.2d 796, certiorari denied 325 U.S. 879, 65 S.Ct. 1553, 89 L.Ed. 1995; Hunter v. United States, 5 Cir., 62 F.2d 217, 220. He enjoys the prerogative, rising often to the standard

of a duty, of eliciting those facts he deems necessary to the clear presentation of the issues. Pariser v. City of New York, 2 Cir., 146 F.2d 431. To this end he may call witnesses on his own motion, adduce evidence, and himself examine those who testify. See United States v. Marzano, 2 Cir., 149 F.2d 923; Guthrie v. Curlett, 2 Cir., 36 F.2d 694; Young v. United States, 5 Cir., 107 F.2d 490, 493; 3 Wigmore on Evidence § 784, 3d Ed. 1940. But he nonetheless must remain the judge, impartial, judicious, and, above all, responsible for a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested. Because of his proper power and influence it is obvious that the display of a fixed opinion as to the guilt of an accused limits the possibility of an uninhibited decision from a jury of laymen much less initiated in trial procedure than he. He must, therefore, be on continual guard that the authority of the bench be not exploited toward a conviction he may privately think deserved or even required by the evidence. United States v. Minuse, 2 Cir., 114 F.2d 36; Martucci v. Brooklyn Children's Aid Soc., 2 Cir., 140 F.2d 732; United States v. Marzano, 2 Cir., 149 F.2d 923.

"In the case at bar this mandate of judiciousness appears to have been breached on unfortunately more than a single occasion. Thus the examination of witnesses and discussions with counsel by the court were spotted with a number of remarks which were not of the form to elicit information or direct the trial procedure into proper channels, but rather to cut into the presumption of innocence to which defendants are

entitled. Beyond this the court actively cross-examined several witnesses, notably the defendant Brandt himself, to a quite unusual extent. This interrupted the orderly presentation of evidence by the defense. But further the questioning appeared mainly to underline inconsistencies in the positions, or to elicit admissions bearing on the credibility, of defense witnesses.

"The government insists on the curative effect of the charge, in which the jury was admonished that its own view of the evidence controlled, citing the similar case of United States v. Aaron, 2 Cir., 190 F.2d 144, certiorari denied Freidus v. United States, 342 U.S. 827. Such admonitions may offset brief or minor departures from strict judicial impartiality, but cannot be considered sufficient here. For the 900 questions asked by the court during this eight-day trial present far more examples of serious incidents. The cumulative effect of these we are unable to hold cured by the formal charge given."

The Circuit Court of Appeals, in deciding the *Brandt* case, cited in a footnote appearing in 196 F. 2d at 656, the case of *Williams v. United States,* decided by the Circuit Court of Appeals for the Ninth Circuit, 93 F. 2d 685.

In the *Williams* case, the defendants were convicted of mail fraud and conspiracy in the trial Court. On appeal the Circuit Court of Appeals for the Ninth Circuit reversed the conviction on the grounds that the trial Judge did not conduct the trial in an impartial manner.

The Court, through Judge Garrecht, stated:

> "In reviewing this assignment, we are not unmindful that the able District Judge who tried this case has, heretofore, established a reputation for fairness and judicial poise, and in this opinion we do not wish to imply that the trial judge intentionally was unfair. But as the authorities herein referred to point out, the harm done is not diminished where the judge, by reason of unrestrained zeal, or through inadvertence, departs from 'that attitude of disinterestedness which is the foundation of a fair and impartial trial.'
>
> "The closing language of the opinion in Hunter v. United States, supra, 62 F.2d 217, at page 220, is applicable to the lower court's activities in the instant case, both with respect to the examination of witnesses and the instructions to the jury:
>
> 'That the district judge did not intend to be unfair is beside the question. The case was tried in such a way that the jury, in considering as a whole the judge's questions and charge, might well have reached the conclusion that he was not impartial, but was insisting upon a conviction. It is vastly more important that the attitude of the trial judge should be impartial than that any particular defendant, however guilty he may be, should be convicted. It is too much to expect of human nature that a judge can actively and vigorously aid in the prosecution and at the same time appear to the layman or the jury to be impartial.' "

The trial record in the case at bar, when viewed in the light of these decisions, conclusively establishes

that the Appellant did not receive a fair and impartial trial.

For the reasons stated in Appellant's Opening Brief, and in this Reply Brief, the judgment of the trial Court should be reversed.

Dated, Reno, Nevada,
July 20, 1961.

Respectfully submitted,
GRUBIC, DRENDEL & BRADLEY,
By WILLIAM O. BRADLEY,
Attorneys for Appellant.

No. 17,317

United States Court of Appeals

For the Ninth Circuit

LAVERE REDFIELD,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Nevada

APPELLANT'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

No. 17,317

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LAVERE REDFIELD,
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APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Frederick G. Hamley, Oliver D. Hamlin and M. Oliver Koelsch, Judges of the United States Court of Appeals for the Ninth Circuit:

COMES NOW the Appellant in the above-entitled case and respectfully petitions the Court to grant a rehearing.

I

The grounds upon which Appellant respectfully requests a rehearing are that the Appellant was denied a fair and impartial trial to which our law entitles him by virtue of the unwarranted participation of the Trial Judge in the proceedings. In support of

this proposition, the Court's attention is directed to the argument on this point in Appellant's Opening Brief and Appellant's Reply Brief. The entire transcript of testimony taken at the trial of the proceedings is replete with examples of the Trial Judge harassing and belittling Appellant in his attempt to present his defense. The Trial Judge harassed and belittled Appellant repeatedly in the presence of the jury.

Appellant does not present this petition for rehearing for the purpose of delay. To the contrary, Appellant sincerely believes that the recent case of *United States of America v. Max T. Salazar,* 293 Fed. 2d 442, decided August 7, 1961 but not reported until after this Court's decision in the case at bar, is worthy of this Court's consideration upon rehearing. In the *Salazar* case, the United States Court of Appeals for the Second Circuit reversed the judgment of conviction in the Trial Court because the Court of Appeals observed that the unwarranted participation of the Trial Judge deprived the defendant of the fair and impartial trial to which he is entitled under our law. The Court of Appeals for the Second Circuit said:

> "There was apparent proof of Salazar's guilt, but we must reverse the conviction because certain remarks and questions of the District Judge were in combined effect, so clearly prejudicial that we cannot say that the defendant received a fair trial to which he was entitled."

In the *Salazar* case, the defendant was represented by counsel. In the case at bar, the Appellant was

without counsel. The transcript of testimony taken in the case at bar, particularly those portions cited in Appellant's Opening Brief in support of this proposition, are infinitely more prejudicial than the colloquy carried on by the Judge and the defendant in the *Salazar* case. In the case at bar during Appellant's closing argument to the jury, the Court made the following statement to the jury (Tr. Vol. VIII, page 2003, lines 24, 25; page 2004, lines 1, 2, 3):

> "The Court. Ladies and gentlemen of the jury, you are admonished that there is nothing in the record on the part of the defendant as to his having checked any statistical records to arrive at the cost as to the purchase of his stock. There has been no evidence here on the part of the defendant at all."

The transcript of testimony indicates that the Appellant had called character witnesses and his cross-examination of government witnesses certainly constituted evidence in the case at bar, yet the Court admonished the jury that there was no evidence in the case on the part of the Appellant at all. The treatment accorded Appellant throughout the trial by the Trial Court in the case at bar certainly deprived the Appellant of a fair and impartial trial when viewed in the light of the cases cited in support of this proposition in his Opening Brief, his Reply Brief and the *Salazar* case cited in this petition for rehearing.

Rehearing is not sought in respect to any question other than the question of whether or not Appellant

was denied a fair and impartial trial in the Court below by virtue of the prejudicial nature of the treatment of Appellant by the Trial Court.

CONCLUSION

Two things are respectfully requested:

1. That a rehearing of this case be granted limited to the proposition of whether or not the Appellant received a fair and impartial trial.

2. That this Court give consideration to Rule 23 of the United States Court of Appeals for the Ninth Circuit by granting a hearing en banc.

Dated, Reno, Nevada,
November 3, 1961.

GRUBIC, DRENDEL & BRADLEY,
By WILLIAM O. BRADLEY,
Attorneys for Appellant and Petitioner.

Certificate of Counsel

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Reno, Nevada,
November 3, 1961.

William O. Bradley,
Of Counsel for Appellant and Petitioner.

No. 17318

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOE GOLDSTEIN and LILLIAN GOLDSTEIN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition to Review a Decision of the Tax Court of the United States.

BRIEF OF PETITIONERS JOE GOLDSTEIN AND LILLIAN GOLDSTEIN.

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No. 17318

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOE GOLDSTEIN and LILLIAN GOLDSTEIN,

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vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition to Review a Decision of the Tax Court of the United States.

BRIEF OF PETITIONERS JOE GOLDSTEIN AND LILLIAN GOLDSTEIN.

The Petition for Review [Tr. 32, 33]* seeks to review a decision of the Tax Court of the United States wherein the Tax Court determined, that the gain arising on the sale of non-depreciable real property reported by the taxpayers as a short term capital gain was in fact a dividend. As a result of this determination the taxpayers were not permitted to offset the gain against a capital loss carry-over credit, adjustments were made to the amount of medical deduction allowable, and it was determined that the taxpayers owed a deficiency of $28,404.13.

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*Reference prefixed with "Tr." refer to the transcript of record herein.

Jurisdictional Statement.

1. The Jurisdiction of the Tax Court is provided in Title 26, U. S. C., Sections 7442 and 6213 under which a taxpayer may appeal to the Tax Court of the United States a proposed deficiency in income taxes.

2. The jurisdiction of this Court upon appeal to review the judgment of the Tax Court is found in Title 26 U. S. C., Section 7482(a) which provides that the United States Courts of Appeal shall have exclusive jurisdiction to review the decisions of the Tax Court. Venue of this review is in the Court of Appeals for the Ninth Circuit by reason of the fact that the petitioners are residents of the Southern District of California and filed their joint income tax return for the calendar year 1953 (the year herein involved) with the Director of Internal Revenue at Los Angeles, California. Title 26 U. S. C., Section 7482(b)(1) provides that venue for review shall be in the United States Court of Appeals for the circuit in which is located the office to which was made the return of tax in respect of which the liability arises.

3. The pleadings necessary to show the existence of jurisdiction:

(a) The 90-day Letter of the Commissioner, and attached statement of liability [Tr. 9-13].

(b) Petition of the Taxpayers [Tr. 5-9].

(c) The respondent's Answer to the Petition [Tr. 13, 14].

(d) Stipulation of Facts [Tr. 15-18].

(e) Memorandum of Findings of Fact and Opinion of the Tax Court [Tr. 19-30].

(f) Decision of the Tax Court [Tr. 31].

(g) Petition for Review [Tr. 32, 33].

Statutes Involved.

Section 115(a) of the Internal Revenue Code of 1939 as amended provides as follows:

> ". . . The term 'dividend' when used in this chapter . . . means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913 or (2) out of the earnings or profits of the taxable year. . . ."

Section 117(a)(2) of the Internal Revenue Code of 1939 as amended provides as follows:

> ". . . The term 'short-term capital gain' means gain from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such gain is taken into account in computing gross income;"

Questions Presented.

1. Whether for tax purposes the gain on the sale of a single parcel of real estate, exclusive of any improvements thereon, to a corporation of which the taxpayers own directly or hold in trust for minor children 2906 shares out of a total of 5500 shares outstanding, constituted a dividend or a short-term capital gain.

Specifications of Errors Relied on.

1. Tax Court erred in its determination of facts and the conclusions of law to be drawn therefrom.

2. The decision of the Tax Court is contrary to law.

Statement of Case.

The petitioners herein are now and were at all pertinent times husband and wife, residing in Los Angeles, California [Tr. 15]. A timely return for the calendar year ending December 31, 1953, was filed with the District Director of Internal Revenue for the Los Angeles District [Tr. 15; Ex. 1-a]; that on the return as filed the petitioners reported a short-term capital gain from the sale of real property for $75,000.00 upon which real property, after deducting cost of $35,000.00 gain of $40,000.00 was returned. This gain was offset against a capital loss carry-over [Ex. 1-a]. The Commissioner of Internal Revenue, in his Notice of Deficiency, determined that the $40,000.00 referred to above constituted the distribution of a dividend from the purchaser of the property (Boys' Market, Inc.) and was therefore taxable as ordinary income [Tr. 12], thus, the carry-over capital loss credit was not applicable.

As developed by the evidence presented before the Tax Court, both oral and documentary, and by stipulation entered into between petitioners and respondent, the facts surrounding the transaction in question were as follows: On and prior to December 27, 1945, the petitioner Joe Goldstein was the sole general partner in a limited co-partnership consisting of himself as general partner and of Edward Goldstein and Joe Goldstein as Trustee for Max Goldstein, limited partners; that said partnership operated under the fictitious name of "The Boys' Market" [Tr. 16]. The business of the partnership was the operation of large supermarkets retailing groceries, meats, vegetables and sundries, located in Los Angeles County, California [Tr. 17].

On September 27, 1945 the co-partnership leased a certain parcel of land situated in the City of San Gabriel, California, from Torley Land Company, a corporation, for a term of fifty years commencing November 1, 1945 [Tr. 16]. The property involved consists of the Southeast corner of Valley Boulevard and Del Mar Avenue in San Gabriel, having 338 ft. frontage on Valley Boulevard and 370 ft. on Del Mar Avenue [Tr. 18]. Among other things the lease provided that the lessee (co-partnership) should pay annual rental of $800.00 together with all taxes, assessments and charges against the property; that the lessee should erect and maintain a building of certain minimum specifications upon said property; that in event of an assignment of the lease that the co-partnership consisting of petitioner Joe Goldstein as general partner, and Edward Goldstein and Joe Goldstein as Trustee for Max Goldstein, limited partners, should remain liable to the lessor or its successors for the performance of all the conditions of the lease, and should be liable for any breach thereof [Ex. 2-b].

The Boys' Market, Inc., a corporation, was incorporated on June 19, 1936, but did not commence business until January 1, 1946, as of which date the assets of the Boys' Market, a limited copartnership, were exchanged for shares of the capital stock of said corporation [Tr. 16]; that among the assets transferred to the corporation was the lease from Torley Land Company of the property previously described [Ex. 3-c], pursuant to which the corporation took possession of the real property and thereafter erected a market building on the property during the year 1948 [Tr. 16, 17].

At the time of the assignment of the lease from the co-partnership to the corporation, the petitioner Joe Goldstein received a letter dated March 28, 1946 from J. Vincent Hannan, attorney for Torley Land Company, advising him that the Torley Land Company specifically did not release the co-partnership from its liability under the terms of the lease [Ex. 7, Tr. 158-160].

At the time the lease was originally negotiated petitioner Joe Goldstein, in behalf of the co-partnership, attempted to purchase the property from Torley Land Company rather than lease it. For that purpose he visited the president of Torley Land Company to negotiate a purchase and sale. At that time Goldstein had in his possession two cashier's checks in the amount of $25,000 and $35,000 respectively, and a third check for $50,000.00. He first offered the $25,000 check without effecting a deal. He then produced the $35,000 check, but when he got through negotiating with it, saw there was no purpose in bringing out the $50,000 check [Tr. 222]. The lease above referred to was then entered into.

In December of 1952 and January, 1953, negotiations were reopened between Joe Goldstein, as president of The Boys' Market, Inc., and Joseph M. Torley, president and principal stockholder of Torley Land Company, relative to the sale by the latter to The Boys' Market, Inc., of the fee of the above referred to property [Tr. 165-168]. These negotiations were

duly reported by Goldstein to his corporation and were recorded in its Minutes of January 27, 1953 [Tr. 45, 46; 168]. As stated in the Minutes, it was the desire of the directors of the corporation to purchase the land in order that a loan might be secured on the entire property (consisting of the land (owned by Torley) and the improvements (owned by the corporation)).

It developed that the Torley Land Company refused to sell its interest in the fee for cash, but would only negotiate on the basis of an exchange for real property to be located in Las Vegas, Nevada [Tr. 169-170; 279-284]. This turn of the negotiations was reported by the petitioner to the board of directors and officers of the corporation [Tr. 49, 50]. The directors thereupon determined that in behalf of the corporation, they were not interested and would not enter into a transaction involving the acquisition of property in Las Vegas, Nevada, under any circumstances [Tr. 50-54; 109-111; 133-134; 170-172]. Thereupon, at a meeting of the board of directors on April 28, 1953 the petitioners were authorized by the board of directors to buy the land in San Gabriel as their private property [Tr. 46, 47].

The petitioners herein then took over negotiations with the Torley Land Company in their individual behalfs and, on June 22, 1953, entered into escrow agreements with the Torley Land Company wherein the petitioners undertook to acquire a certain parcel of real property in the City of Las Vegas, Nevada, and to

erect thereon an apartment house at a total cost of $35,000.00, to be exchanged for the fee to the real property in San Gabriel subject to the lease thereon to the Boys' Market [Ex. 8]. The petitioners then advanced $35,000.00 of their own funds; the property in Las Vegas was acquired; the apartment house was constructed thereon; and on December 8, 1953 the exchange was completed [Exs. 6, 8; Tr. 178, 179]. Immediately thereafter the petitioners offered to sell the real property to the lessee at its fair market value. Investigation was then undertaken by two of the directors to ascertain a fair price to be paid for the property. Edward Eddy, a director and secretary-treasurer, made inquiries through the Bank of America as to fair market value of the land, and was advised that $75,000.00 was a fair price [Tr. 58, 59]. Max Goldstein, also a director and vice-president, obtained a corroborating appraisal from a local real estate man [Tr. 135, 136]. The corporation thereupon purchased the property from the petitoners for $75,000.00.

An independent appraiser produced at the trial, set the fair market value of the property in question at $79,600.00 as of December, 1953, and expressed the opinion, based upon examination of the property, the policy of title insurance [Ex. 6] and the lease existing on the property prior to sale [Ex. 2-b] that $75,000.00 was a fair price [Tr. 88-95].

ARGUMENT.

1. Transaction Properly Taxable as Capital Gain.

The transaction whereby the petitioners acquired the land in question and subsequently sold it to the corporation, is neither void nor voidable, despite the fact that they were the owners directly or in trust of 52.8 per cent of the stock of the corporation.

Under the federal decisions, the statutes and decisions of the State of California are controlling and govern the contractual relations as between the petitioners and the corporation.

Erie v. Tompkins, 304 U. S. 65;

Langhorn v. Bank of America (9 C. A.), 88 F. 2d 551, 553;

In re Bastanchury (9 C. A.), 66 F. 2d 653, 656;

Bryan v. Swofford, 214 U. S. 279.

Where taxable situations arise from relations entered into under state law, the nature of such relationship and the rights of the parties under the state law must be kept in view in determining the incidence of federal taxation.

Ward v. Commissioner of Internal Revenue (9 C. A.), 224 F. 2d 547.

That which constitutes an interest in property held by a person within a state is a matter of state law as respects liability to federal taxation.

Sullivan's Estate v. C. I. R. (9 C. A.), 175 F. 2d 657.

In measuring the transaction occurring between the petitioners and their corporation, it is therefore essen-

tial to first determine the California law with relation to the transaction. The California Corporations Code provides that if a corporation is properly represented by other officers, a transaction between an officer or director and the corporation is not even voidable unless fraud against the corporation is shown.

Cal. Corp. Code, Sec. 820.

A contract entered into by an officer of a corporation to his own advantage and in violation of his trust, is not ordinarily void but is only voidable at the option of the corporation or its stockholders who are the beneficiaries.

Phillips v. Sanger Lumber Co., 130 Cal. 431.

But, if at the time of the transaction the directors are the only stockholders, the transaction is neither void nor voidable.

Garretson v. Pacific Crude Oil, 146 Cal. 184;
Smith v. Pacific Bank, 137 Cal. 363.

The above principles are not only recognized in California, but similar principles are recognized by the Federal Courts. For example, in *Central Trust v. Bridges,* 57 Fed. 753, 767, the Court states:

> "There is no law which makes it impossible for a majority stockholder to enter into a contract with his company. *Wright v. Railway Co.,* 117 U. S. 72. As already explained, the company may appeal to a court of equity to set such contract aside, if it is unfair or unconscionable, for fraud or undue influence; but until this is done the contract expressed the true relation between the parties."

It would thus appear that as between the petitioners herein and the corporation, that the sale of the real property to the corporation is neither void nor voidable, and therefore could not be construed by the parties to the transaction as representing payment of dividends or a contribution of capital, nor anything other than a purchase and sale of real property.

Taxing Statutes Applicable.

The question, however, would then become whether or not the Commissioner of Internal Revenue can disregard the bona fides of the transaction and treat the transaction as not a sale but purely a device wherein and whereby the corporation was able to divert a portion of its earnings to the petitioners in the form of a secret and preferred dividend. To achieve this result it was the contention of the Commissioner, by his adoption [Tr. 11] of the Report of Examination of the Revenue Agent [Ex. 4-d] that the petitioners were in fact the agents of the corporation in acquiring the land from Torley Land Company. In this connection, it is interesting to note that the examining revenue agent never inspected the records of the corporation, nor questioned the petitioners or the other officers or directors of the corporation concerning the transaction here in question [Tr. 106, 136, 181]. It was this failure which undoubtedly led the revenue agent to predicate his conclusions on the statement that "The corporation should have been given an opportunity to purchase the property, and only upon their refusal or rejection was it proper . . . for the taxpayers to have acted." [Ex. 4-d].

It is clear from the evidence that the petitioners were specifically released from any fiduciary capacity

in dealing with the land and it is also clear that they were not dealing as agents for the corporation. Under the law of California (Calif. Civil Code, Sections 2295-2300 inclusive), there are but two types of agencies, namely, actual and ostensible. Ostensible agency is defined as being when the principal intentionally or by want of ordinary care, causes a third person to believe another to be his agent when in fact the latter is not employed by him. That, of course, is not the situation here. On the other hand, an actual agency must rest on agreement or consent.

Naify v. Pacific Indemnity Co. (1938), 11 Cal. 2d p. 5; 115 A. L. R. 476; 76 P. 2d 663.

In the instant case, therefore, in view of the action of the board of directors who constituted all of the stockholders, petitioners were clearly not agents.

Actually there is no federal taxing statute discouraging sales of non-depreciable property by an individual to his controlled corporation. In this connection, in 1951 Congress did, by the addition of Section 117 (O) to the Internal Revenue Code (now Section 1239, 1954 Code) deal with the subject of treatment of sale of depreciable property to one's controlled corporation. However, by that section Congress refuses to apply capital gain treatment to a sale of depreciable property to a corporation more than 80 per cent of which was controlled by the transferror, his wife, his minor children, and his minor grandchildren. Thus, even if we were dealing with depreciable property, which we are not in the instant case, the inhibition of that section would not apply to the current situation where the control is but 52.8%.

In the view of petitioners, the situation herein lends itself to the language of the Court in *Sun Properties v. U. S.*, 220 F. 2d 171, ff. commencing on page 173:

> ". . . The holding below is based on the general principle of tax law that the substance of a transaction rather than its mere form controls tax liability related thereto. To be more precise, its rationale is that this was not a customary or usual sort of sale nor the type which would have taken place between parties at arm's length; the decisive consideration motivating the transaction was the minimizing of taxes; and, in fact, that was the only business purpose of the transaction Therefore, the court reasoned, it was not a sale at all; and since the increase in assets of the corporation, if not offset by a corresponding increase in liabilities or debts of the corporation, represents an increase in capital, the transaction was in substance an increase in capital. One other consideration which undoubtedly influenced the holding was that this was a 'thin' corporation; that is, one with an unusually high ratio of debts to capital on its books.
>
> "This rationale is perilously plausible. It is in effect saying to the taxpayer, 'You did this under suspicious circumstances; therefore, you did not do it at all, and you are not entitled to any tax advantages.' For all of the circumstances relied upon by the Government are consistent both logically and empirically, we think, with the opposite conclusion that the transaction was a sale in fact as well as in form; these are good reasons to scrutinize the transaction carefully, but they

are not rational proof that it was something other than what it purported to be.

"Let us consider first the argument that the transaction was not of the arm's-length sort. We think the law is as it is stated in Prentice-Hall, Federal Taxes Sec. 28,205:

> 'One of the circumstances which may cause the test of substance v. form to be applied is that the transaction involved was not an arm's length transaction * * *. The fact that a transaction was not at arm's length has apparently not of itself been a basis for disregarding the transaction but it does raise the question of whether the substance is the same as the form.'

"Indeed, we think it may be stated as a general rule that a transaction must not be disregarded simply because it was not at arm's length. *Staab,* 20 T. C. 834. And we think it would be judicial legislation of the most inexcusable kind for a court to create such a rule.

"Likewise, the argument that the transaction was not done in the customary manner must go by the board. We know of no general requirement that transactions be entered into in a conventional way for them to be recognized as having the usual tax result. At most, this is only another reason to view the transaction closely for indicia of a different sort of transaction; it is not itself an indicium here of a capital transfer or of a sale, for we may take judicial notice that there are many kinds of capital transactions as well as many debtor-creditor transactions and sales which are highly unconventional. See *Stevens, Corporations* (2d Ed.) 414-418.

"What about the fact, which we may assume to be true that Peacock's predominant motive was to minimize taxes? In *Gregory v. Helvering,* 293 U. S. 465, 469, 55 S. Ct. 266, 79 L. Ed. 596, 97 A. L. R. 1355, the Supreme Court said that a motive of tax avoidance will not establish liability if the transaction does not do so without it. It may fairly be said that a tax avoidance motive must not be considered as evidence that a transaction is something different from what it purports to be. 8th Ann. *N. Y. U. Institute on Federal Taxation* 990, 1003:

> 'Transactions are properly subject to careful scrutiny when the only ascertainable motive is tax avoidance, just as they are subject to scrutiny when between the members of a family. the error into which the courts have fallen, however, is that they have elevated the rule of careful scrutiny into a rule which changes the substantive effect of the evidence found. Although transactions like these should be carefully studied they should be treated, for tax purposes, on the basis of this careful study, just like tax cases where tax avoidance is not a motive.'

"And we said in *Montgomery v. Thomas,* 146 F. 2d 76, 81:

> 'the general rule is in accord with that expressed in *Johnson v. Commissioner of Internal Revenue,* 2 Cir. 86 F. 2d 710: "Legal Transactions cannot be upset merely because parties have entered into them for purpose of minimizing or avoiding taxes which might otherwise accrue." '

"Nor does the fact that this transaction may not have had any business purpose other than saving taxes, rationally imply that it was not a sale. No cases require that a sale have any business purpose beyond that of realizing a capital gain. See *Hobby,* 2 T. C. 980:

> 'The Commissioner argues that petitioner did not in fact sell, or may not be regarded as having sold, the shares. He says that this is because the alleged sale 'had no business purpose.' What kind of 'business purpose' must be shown as necessary to the recognition of a sale is not made clear, and there is no statutory requirement to that effect. The question is not one of purpose, but whether the transactions were in fact what they appear to be in form. *Chisholm v. Commissioner,* (2 Cir.) 79 F. 2d 14. It is true that the sales were made at times when their effect would be to avoid the impact of the forthcoming redemption and the resulting tax. Petitioner, a shareholder, had an unrealized increment in his shares which he wanted to realize. Collaterally he wanted to use a legitimate transaction which would impose upon him the least tax. This is not an interdicted purpose. The primary purpose to realize the gain was a legitimate business purpose, even though it also had a collateral favorable tax effect.'

"On the other hand, where the issue is the recognition of a corporate reorganization, *Gregory v. Helvering,* supra, or of a one-man corporation as a separate entity, *Higgins v. Smith,* 308 U. S.

473, 60 S. Ct. 355, 84 L. Ed. 406, or of a sale and leaseback arrangement, *Shaffer Terminals, Inc. v. Commissioner,* 9 Cir., 194 F. 2d 539, the existence of an independent business purpose may be very important. However, we would be most reluctant to impose a court-made requirement of a business purpose independent from taking a gain or loss, in determining the genuineness of sales in general, since it is common knowledge that vast numbers of sales have been made and are still being made for the purpose of taking gains and losses at times which provide the optimum tax benefits.

"As for the circumstance that taxpayer is a 'thin corporation,' we do not think this is any ground to infer that this transaction was a contribution to capital. Having treated this matter fully in *Rowan v. United States,* No. 15,167, we think it unnecessary to repeat what we said on that point.

"So, having scrutinized the transaction closely, as we were bound to do, we find not a particle of proof that it was in fact a contribution to capital nor that it was intended as such. Evidence which may tend to prove that a transaction was a contribution to capital may be of many sorts. We enumerated some of them in the *Rowan* case, supra; that payments of cash were made for the acquisition of capital assets; that certificates of stock were issued; that repayment was subordinated to other indebtedness; that the maturity date is inordinately postponed; that the parties agree not to enforce collection; that 'interest' is to be paid

out of earnings only; or that cash advances are made to commence the corporate life. See also *Stevens, Corporations* (2d Ed.) 415-418, where in addition to these factors, the granting of voting power to so-called creditors and the absence of a fixed maturity date of a 'debt' are cited as indicia of a capital contribution rather than a loan or sale. The absence here of any provision for interest does not seem to us to be an indication that this was not a sale, particularly where Peacock was the sole stockholder; the purchase price in a sale can of course be stated in a lump sum payable in installments without differentiation of principal and interest, or for that matter, without interest.

"On the other hand, the provision for fixed payments without regard to corporate earnings in the present case is evidence that a debt actually was created. The language of the document and the book entries are further evidence that a sale took place. *Welp v. United States,* 8 Cir., 201 F. 2d, 128, 131. This is sufficient evidence to rebut the presumption of correctness with which the Commissioner's determinations are clothed, and the trial court was clearly wrong in finding that the transaction was a contribution to capital and not a sale.

"Furthermore, the taxpayer cites two Tax Court cases which it says squarely support its contention that the transaction was a sale which entitled it to a higher tax basis. It seems to us that those cases are in point and that the Government has not succeeded in distinguishing them. *Herff &*

Dittmar Land Co., 32 B. T. A. 349, Acq. XIV-2 C. B. 10; *Hollywood, Inc.* 10 T. C. 175. Acq. 1948-1 C. B. 2. The case of *Curran v. Commissioner,* 8 Cir., 49 F. 2d 129, also supports our decision. There the transaction was given effect as a sale even though payment for the property was denominated a 'dividend,' and there was no written contract of sale. We also consider it significant that Congress has since amended the Internal Revenue Code for the manifest purpose of preventing further use of this very method of reducing taxes; that the Commissioner has acquiesced in the *Herff* and *Hollywood* cases, supra, and that many taxpayers may have relied on these decisions. The policies underlying the *stare decisis* principle are especially important where there may have been such reliance, and they alone would be enough to sustain our present holding in the absence of any cases to the contrary." (Footnotes omitted.)

For a further extension of the principles enunciated in the *Sun Properties* case, *supra, Warren H. Brown,* 27 T. C. 34, wherein the Tax Court follows the holding in the *Sun Properties* case, *supra,* with respect to a situation wherein the Commissioner of Internal Revenue attempted to treat payments received by the taxpayers on the sale of certain property as being in the nature of dividends, rather than the sale of capital assets.

While it is not conceded that the motives of the directors in declining to deal in behalf of the corporation with Torley Land Company inasmuch as the transaction involved acquisition of property in Nevada,

are material, nevertheless, so long as those reasons were the independent determination of the directors acting within the scope of their duties and were arrived at for what they considered to be valid business reasons, they cannot now be questioned by the Commissioner, even though if he had been a director he might have voted differently. The fact that the Goldstein brothers other than Joe had such an antipathy toward Las Vegas by reason of their past experiences in that city and their inability to resist the lure of gambling, while possibly not attractive to the judge trying the case were nevertheless real objections in their own minds and constituted a valid reason for not desiring to enter the transaction. As to the secretary-treasurer, Eddy, his reasons which he also impressed upon the others, were what he considered a strong possibility of an interpretation that the corporation might be termed as being in inter-state business and therefore subjected to certain inhibitions with reference to other affairs of the corporation, and further that the transaction could well be questioned by the financial institution who had extended an open line of credit to them, in that such transaction might be construed as contrary to the negative covenants of their agreement. It is true that a lawyer might or might not have interpreted the effect of the transaction in a different light than Mr. Eddy did, but these were his reasons arrived at in the exercise of his judgment as secretary-treasurer and a director of the corporation and were entitled to the respect of the other directors. Mr. Eddy's good faith in arriving at such conclusions has not been questioned by anyone including the Judge of the Tax Court, although he expressed doubt as to their validity.

So far as Joe Goldstein was concerned, he had a strictly personal reason for wanting to acquire the real property from the Torley Land Company, entirely aside from whether the corporation ultimately purchased it from him or not. That was the fact as stated by him and not contested that in connection with the planning of his estate he had been advised by his attorney and by his estate advisors that as the former general partner of the Boys Market, a co-partnership, he or his estate were liable so long as the lease existed between Torley and any successors to the co-partnership. He was therefore determined to clean up this loose end of his affairs in order that in the event of his death his estate could be administered and closed in due course and not remain liable for a period, as it then existed, of some forty years for any breach of the lease.

There can be no doubt that the entire transaction was entered into in good faith by all of the parties concerned. Petitioners did not move to acquire the property for themselves until the proposition had first been offered to the corporation and refused by it, and they had been specifically authorized to deal in their private capacities. After acquiring the property they then offered it to their corporation in order that the corporation might then achieve its desired goal of merging the lease and the real property so as to release their invested funds into their working capital. In offering the property to them, he did so by suggesting that they ascertain the fair market value and pay him that amount. Independent investigation undertaken by two of the directors established that $75,000.00 was a fair price and that was the amount for which the deal was settled. This price was substantiated by

subsequent determination made by a qualified independent appraiser who took into consideration all of the factors concerning the property including the fact of the outstanding lease.

While the Government did not produce proof to offset that offered by the petitioners as to the fair market value of the property for the purpose of demonstrating the fairness of their dealings with the corporation, nevertheless the Tax Court chose to scout the valuation of $75,000.00. In this regard it was pointed out that Goldstein had not been willing originally to pay more than $35,000.00 and would not have paid more than $35,000.00 for the property, thus surmising that that amount represented the fair market value of the property. However, the evidence showed that as early as 1942 when originally the lease was signed, Goldstein was prepared to offer $50,000.00 for the property, but refrained from doing so when he found that Torley was not interested in selling. Since that time and shortly before the acquisition of the property by petitioners, major developments greatly increased the value of the property. As pointed out by the appraiser who was familiar with the property at the time and who had participated in behalf of the public agency involved, Del Mar Avenue in 1949 and 1950 and upon which the property abutted, had been widened, extended, and had become a major artery. The fact that an offer was made in 1942 for $35,000.00 but with intent to increase the bid to $50,000.00 if necessary, is in no way derogatory to the conclusion that $75,000.00 was a fair value in 1953.

No weight was apparently given by the Tax Court for the financial costs and risks assumed by the pe-

titioners in acquiring and building the Las Vegas property. If loss had been occasioned, the burden would have fallen upon them exclusively.

Conclusion.

It is respectfully submitted that the transaction in question was properly reported by the petitioners on their income tax return for 1953. Therefore, the decision and judgment of the Tax Court of the United States should be reversed.

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Attorney for Petitioners.

No. 17318

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOE GOLDSTEIN and LILLIAN GOLDSTEIN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Reply Brief of Petitioners Joe Goldstein and Lillian Goldstein.

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Introduction.

The record discloses only one genuine issue, which is properly a question of law despite the repeated assertions by the Tax Court and the respondent that it is a question of fact: Whether $40,000.00 of the $75,000.00 paid by the Boys' Market, Inc. for the San Gabriel property was gain to the petitioners, or whether it was a distribution by the corporation in view of the favorable lease. The question was resolved by the Tax Court in the form of a fact finding. Actually it was a legal determination since there were no real fact issues. The findings of the Tax Court, although not complete, were consistent with the petitioners' position until the final determination that the $40,000.00 represented a distribution of corporate earnings.

The additional factors which the Tax Court simply disregarded in its findings are: the valid business pur-

pose of the corporation for acquiring the land; the valid business reason of the petitioners to acquire the leased property and be freed from contingent liability; the valid exercise of managerial discretion by the corporate directors in deciding that the corporation could not acquire the land from the lessor on the lessor's terms; and the monetary value of the land to the corporation. These ultimate facts were inescapable under the evidence which the Tax Court was bound to accept under well established rules hereinafter discussed. These ultimate facts clearly refute the inferences drawn by the Tax Court and the respondent. Without such inferences, there is no basis for the Tax Court's decision except as a determination of law.

Even on the basis of such inferences, there is no identifiable theory upon which to uphold the determination of the Tax Court as a fact finding. The specific findings of fact by that Court are in no way consistent with the application of the substance versus form theory of the Gregory decision, as that theory was formulated initially by the Supreme Court and uniformly interpreted thereafter. If the transactions were real, with substantive legal consequences, then any motive to avoid taxation is immaterial. See the discussion by Learned Hand in *Chisholm v. Comm.* (C. C. A. 2), 79 F. 2d 14, quoted in footnote 11 of the appendix.

The respondent seeks a rubber stamp of the Tax Court's so-called inference of fact, but the trend toward delegation of judicial responsibility to administrative agencies has been emphatically disapproved by Congress in the legislation curtailing the effect of the *Dobson* case. The purpose of administrative agencies is necessarily the collection of tax, not the formulation of rules to furnish taxpayers with guideposts. The Tax Court is often realistically described as a quasi administrative agency since its basic functions are the same as those exercised under its previous designation.

General acceptance by the Court of Appeals of arbitrary Tax Court determinations categoried as "inferences of fact" would cause confusion in the tax law, blurring its clear outlines and sacrificing long term revenue policy to immediate administrative expediency. Fortunately, this Court has not subscribed to that short-sighted view.

The issue raised by the evidence under applicable rules is a legal question since it can be generalized with all of the essential elements included. A corporation buys from its principal shareholder, its chief executive, property on which it has a long term lease at less than the current fair rental, and it pays a purchase price consistent with current fair rental. Does the gain to the shareholder by reason of the adjustment in purchase price to fair market value, consistent with currrent fair rental, constitute a disguised dividend? The Tax Court held "yes" in the instant matter.

It will be shown herein, however, that in analogous situations the courts hold that the corporation does not pay a dividend when it receives or has received fair value in exchange, even though the payment is voluntary and could have been avoided or reduced by insistence upon the corporation's legal rights. It will also be shown that there can be no taxable dividend without a corresponding reduction of the corporation's assets. There is no such reduction when the corporation buys property at a price based on its current fair marke value.

Although the error of the Tax Court appears to be basically one of substantive law, the Tax Court also erred by substituting inference for direct and uncontroverted testimony. The uncontroverted and unimpeached testimony showed valid business reason for the Boys' Market, Inc., to refuse to deal with the Torley Land Company; for the petitioners to acquire the San

Gabriel property; and for the Boys' Market, Inc. to acquire such property. Such testimony also showed that the value of the land to the Boys' Market was $75,000.

Points Made in Opening and Answer Briefs.

The brief of the respondent freely draws inferences contrary to the evidence, based largely on the undisputed facts that Joe Goldstein was the controlling shareholder and the chief executive of the corporation, and freely speculates on the basis of such inferences. Moreover, clearly stated testimony is misinterpreted with respect to the reasons for the corporation's acquisition of the land. On page 16 of the respondent's brief, the testimony of Edward L. Eddy is discussed, and an effort is made to show an inconsistency in the purpose to acquire the land in order to effect a sale and leaseback of the entire property, and the collateral or alternative purpose to improve the borrowing capacity of the corporation. Obviously no such inconsistency exists. The foregoing argument of the respondent appears to be the basis for his statement on page 10 of his brief that the sale and leaseback obliterated the reason advanced for the corporation's purchase of the property.

It has been demonstrated in the petitioners' opening brief that the Tax Court's decision cannot be sustained on any theory of agency, and the respondent agrees in his brief (p. 21) that there was no holding to that effect. Thus, *Utter-McKinley Mortuaries* (C. A. 9), 225 F. 2d 870 is entirely inapplicable to the instant situation, since that case is based on the ground that the officer-shareholder therein involved was in a fiduciary capacity and "As the agent of a separate entity capable of dealing independently, he would have been bound to give to it all the perquisites and advantages which he obtained."

Petitioners' opening brief discussed at length the motives of the Boys' Market, Inc. board of directors in declining to make the trade of real estate on the terms of the lessor, and at the same time emphasized that such motives are not material to the instant matter. The board was not required by any rule of law to have a business purpose for a negative decision on an offer. The rule of "substance v. form" does not apply to require such a business purpose inasmuch as there has been no contention by the respondent that the transactions herein involved were anything other than they purported to be, *i.e.,* actual sales in each case giving rise to substantive legal rights. Nevertheless, it was shown that the good faith of the directors and the candor of their testimony was never questioned by the respondent and the Tax Court. They only questioned the soundness of the directors' business judgment. Thus, even if business purpose were a relevant factor, the respondent and the Tax Court were usurping the well established province of management.

It was also brought out in the petitioners' opening brief that Congress has enacted specific legislation denying capital gain treatment when property is transferred to a controlled corporation under circumstances which do not apply to the instant matter. The respondent's position and the Tax Court's decision constitute an enlargement of the Congressional purpose contrary to basic principles of statutory construction.

Limitations on "Clearly Erroneous" Rule.

The respondent puts much weight on the proposition that the ultimate question herein is a question of fact, and that the Tax Court's findings are to be upheld unless clearly erroneous, even though the finding is based on inferences from basic facts. The Supreme Court decision which he cites, *Comm. v. Duberstein,* 363 U. S.

278, dealt with the narrow question of gifts vs. compensation and stated that the sole criterion was the "dominant reason that explains his action in making the transfer." In this context, the Court then discusses the "clearly erroneous" rule of Fed. Rules Civ. Proc., 52(a), and reiterates the comment made in *United States v. United States Gypsum Co.,* 333 U. S. 364, that the rule applies to factual inferences from undisputed basic facts.

Two points are significant. In the *Duberstein* case, the Court reversed the lower court on one point where there was merely a finding that there was a gift. The Supreme Court said "Such conclusive, general findings do not constitute compliance with Rule 52's direction to 'find the facts specially and state separately . . . conclusions of law thereon.' While the standard of law in this area is not a complex one, we four think the unelaborated finding of ultimate fact here cannot stand as fulfillment of these requirements." It is submitted that the ultimate finding of the Tax Court in the instant matter, completely without support in the evidentiary findings, is subject to precisely the above quoted criticism.

The second significant point as to *Duberstein* is the attitude of this Circuit on the very feature for which it is cited by the respondent, *i.e.,* the application of Rule 52(a) with respect to factual inferences from basic facts, as that point was analyzed in the *Gypsum* case. This feature was covered in *Gillette's Estate v. Comm.* (C. A. 9), 182 F. 2d 1010, which discussed at some length this Court's review powers in light of the Internal Revenue Code amendment modifying the Dobson rule. In reversing the Tax Court, this Court used language pertinent to that question (quoted in footnote 1 of the appendix to this brief), discussing the United States *Gypsum* case on which Duberstein relies.

It is to be noted the Tax Courts' inferences of fact in the instant matter, far from being drawn from documents or undisputed facts as required in *Gypsum* and also in *Duberstein,* were based on speculation that disregarded the unimpeached and uncontroverted testimony.

The *Gillette* case shows that the effect of this Court's treatment of the lower court's inferences from basic facts is much the same as that of the Third Circuit in *Lehmann v. Acheson*, 206 F. 2d 592, where it was said that the lower court's ultimate finding from evidentiary facts, reached by processes of legal reasoning is actually a legal inference free from the "clearly erroneous" rule. *Weyl-Zuckerman & Co.* (C. A. 9), 232 F. 2d 214, also cited by the respondent, affirmed the Tax Court in a summary opinion and agreed with its view of the facts. This Court again refers to Rule 52(a) and states that so-called inferences are findings of fact within the meaning of the rule. Since an affirmance of the Tax Court was involved, there was no occasion for extended analysis of the rule, and delineation of its limits, as given in the *Gillette* case. Thus, *Weyl-Zuckerman* adds nothing to this Court's prior decisions.

This Court also protects the taxpayer against administrative abuse through unwarranted application of the presumption in favor of the Commissioner's determinations. In *Clark v. Comm.* (C. A. 9), 266 F. 2d 698, cited by the respondent, this Court emphasizes (quotation in footnote 2 of appendix) that such a presumption disappears when the taxpayer introduces evidence contrary to the Commissioner's determination.

The Tax Court Decision.

The facts with respect to the lease on the San Gabriel property were set out fully in the findings. In discussing the execution of the lease by the partnership in 1945, the Court mentions [Tr. 20-21] that Joe Goldstein had previously attempted to buy the land for a market site but had been unable to agree with Torley on terms. The Court omits, however, to mention the uncontroverted testimony favorable to the petitioners, described on page 6 of the opening brief of the petitioners in this proceeding, that Joe Goldstein had been prepared to offer $50,000 for the property but had not offered more than $35,000 when it became apparent in negotiations that Torley would not sell [Tr. 222].

A finding in accordance with this testimony should have been made and would have conflicted with the Court's statement in its opinion [Tr. 29] that Joe Goldstein had refused to pay more than $35,000 for the property when negotiating on behalf of the corporation; the Court apparently misspoke in referring to the corporation since it was only on behalf of the partnership that $35,000 had been offered for the property.

Findings are made [Tr. 22] that the corporate minutes first discussed the purchase of land by the corporation and the reasons why such purchase would be an advantage with respect to a loan and increase of working capital; and that the later minutes stated that it had been decided that the petitioners would buy this land as their private property, and that they may sell it in the future to the corporation. The findings did not mention at this point the substantial reasons for this corporate decision which are discussed on page 7 of the petitioners' opening brief herein, and which are supported by uncontroverted and unimpeached testimony [Tr. 50-54; 109-111; 133-134; 171-172; 236-238]. This testimony clearly brings out that the efforts of the

corporation to buy the land in 1952-1953 were unsuccessful because Torley insisted upon a trade for its own tax reasons, and that the Boys' Market, Inc. directors were not interested in a trade, for reasons which they considered to be decisive and substantial. This testimony was ignored in the findings of the Tax Court.

The undisputed and material testimony as to the value of the property at the time of its purchase by the Boys' Market, Inc. from the petitioners was not reflected in the Tax Court's findings as it should have been. However, the Court appears in its later discussion to recognize that the property could have the $75,000 value if it were not for the lease.

Nothing actually contained in the findings is inconsistent with the petitioners' position until the ultimate conclusion of fact, which appears to have been realistically a legal determination.

The reasons for the corporation's decision in 1953 not to enter into the trade are referred to by the Tax Court in summary fashion with the comment, "Petitioners attempt to explain. . ." [Tr. 27]. The reasons why the corporation wanted to acquire the property, however, and why the transaction was handled as a purchase from its shareholder rather than as a trade with its lessor, are well supported by unchallenged, uncontroverted, unimpeached and plausible testimony. The Tax Court makes a similar comment concerning the petitioners' wish to be relieved of contingent liability under the lease. There was no reason for the Court to discount such testimony except for the fact that interested parties were the witnesses. As clearly appears from the decisions hereinafter discussed, this is not a valid reason for the Tax Court to ignore and discount such evidence. In *Tank v. Comm.* (C. A. 6; 1959), 270 F. 2d 477, the Court said:

> "What we have attempted to do in this treatment of the present review is to point out some of

> the instances which illustrate the tendency of the Tax Court to ignore plain, uncontroverted testimony, and to reach for facts contrary to the testimony without there being any basis in fact for so doing. Certainly, the trier of the facts may disbelieve witnesses. We say, however, that the trier of the facts completely ignored or disregarded what appears to be a substantial quantity of reliable testimony without giving any explanation therefor."

The real question involved in this matter was then discussed by the Tax Court [Tr. 28-29], *i.e.,* the fact that the petitioners made a substantial profit on a transaction by reason of the fact that the purchase price of the property on which the corporation had a lease, was adjusted to reflect the current fair rental value of the property. The Tax Court made its legal determination against the position of the petitioners.

The Tax Court's ultimate finding of fact and conclusion of law appeared to be related in some way, not satisfactorily explained, to its lack of consideration and acceptance of the uncontroverted testimony stating reasons; why the corporation desired to acquire the San Gabriel property; why it did not go into the trade urged by the Torley Land Company, permitting the property to be acquired instead by the petitioners; and why Joe Goldstein had personal reasons to effect a termination of the lease. Also the Court disregarded the value of the land to the corporation. In view of the apparent bearing of these factual considerations upon the Tax Court's decision, it is helpful to examine the principles governing the weight to be accorded uncontroverted testimony, even from interested parties, and the appellate function of the Circuit Court as stated by this Court.

Several later decisions of this Court follow the rationale of *Gillette's Estate,* herein before discussed and quoted at length in footnote 1 of the appendix.

In *Gensinger v. Comm.* (C. A. 9), 208 F. 2d 576, this Court emphasized that the material facts were substantially undisputed, and held in the alternative that the Tax Court applied the wrong rule or that its finding was clearly erroneous. See quotation in footnote 3 of the appendix.

See also *McGah v. Comm.* (C. A. 9), 210 F. 2d 769, and *Hypotheek Land Co. v. Comm.* (C. A. 9), 200 F. 2d 390, where this Court reversed the Tax Court on similar grounds.

A review of the decisions in other circuits shows that direct, uncontroverted and unimpeached testimony of a taxpayer may not be disregarded. The overwhelming weight of authority holds that it must be accepted if credible and consistent with proven facts. In a leading case, *Blackmer v. Comm.* (C. C. A. 2; 1934) 70 F. 2d 255, the Second Circuit (quotation in footnote 4 of appendix) reversed the Board of Tax Appeals' affirmance of the Commissioner's disallowances of business expense deductions.

In *Tank v. Comm.* (C. A. 6; 1959), 270 F. 2d 477, a Tax Court decision concerning reasonableness of salaries, was reversed (quotation in footnote 5 of appendix) on the ground that it was contrary to the unimpeached, competent, relevant and uncontradicted testimony of the petitioner.

In *A & A Tool and Supply Co., et al. v. Comm.* (C. A. 10), 182 F. 2d 300, the Circuit Court reversed a Tax Court decision which had disregarded testimony as to rental value of property, excluded an accountant's testimony, and disallowed deductions for commissions paid. The Court stated that the presumption that the

Commissioner's determination is correct is only one of law and does not constitute evidence; that when evidence is introduced by the taxpayer sufficient for the Tax Court to make finding contrary to the determination the presumption disappears; that when there is substantial evidence to support the findings or when they are clearly erroneous, they must be accepted. It was stated further that the Tax Court may not arbitrarily discredit and disregard unimpeached, competent and relevant testimony of a taxpayer which is uncontradicted. In discussing the rental value of property leased to the corporation by Mrs. Schuster, the president of the company, the Court's observations (quoted in footnote 6 of the appendix) are particularly relevant to the instant matter.

See also *Foran et al. v. Comm.* (C. C. A. 5; 1948), 165 F. 2d 705, and *Schuh Trading Co. v. Comm.* (C. C. A. 7; 1938), 95 F. 2d 404.

The Legal Issue.

Can a majority shareholder, the chief executive of a corporation, sell property to a corporation at its fair market price without incurring federal income tax on a "disguised dividend," if the corporation has a long term lease on the property at a rental figure below the current fair rental value?

It seems to be a matter of first impression, to be decided by this Court, whether a sale by a principal shareholder to the corporation, in circumstances such as described above and involved in the instant matter may give rise to a disguised dividend. No decisions can be found where this exact point has been raised. However, the principle which should be applicable here has been applied frequently in analogous situations. If the corporation receives fair value from the shareholder there can be no disguised dividend, even though the cor-

poration waives legal rights or makes voluntary payment.

For instance, the well recognized principle that a corporation may voluntarily pay compensation for past services to its principal shareholders, who is also an officer, illustrates that a corporation need not rely on technical legal rights in dealing with shareholders in order to avoid the "disguised dividend" theory. In the case of such payment for services in past years, even though there is no agreement nor legal obligation on the part of a corporation, the payment constitutes deductible compensation if the amount is in line with the actual value of the services previously rendered.

The rationale of these decisions governing tax treatment of compensation for past services applies to any dealing between a corporation and its shareholders where the corporation goes beyond what it legally could do, and accords its shareholders treatment consistent with realistic fairness.

The leading case on this question is *Lucas v. Ox Fibre Brush Co.* (1930), 281 U. S. 115, (quotation in footnote 7 of appendix) where the Supreme Court held that compensation voluntarily paid for past services was deductible. This decision has been followed uniformly in later cases: See Prentice-Hall Federal Taxes, Par. 11,580.

The same rationale was used concerning another fact situation in *Hugh Walling* (1953), 19 TC 838, (quotation in footnote 8 of appendix) where cash was paid by a corporation to its shareholders as an adjustment of the valuation of property which the shareholders had contributed to the corporation for their stock. It was held that this payment was not a dividend despite the fact that the corporation was not legally obligated to make the adjustment.

Morris E. Floyd (1955), 14 TCM 835, TC Memo 1955-209, involved a case with similarities to the instant matter. In the *Floyd* case, the petitioner and his wife owned practically all the shares of Floyd and Company, a corporation which was the lessee of property from the Cincinnati Gas & Electric Company. The lessor had agreed to expend $25,000 a year to advertise certain products handled by Floyd and Company as distributor, and also gave the Floyd and Company the right of first refusal before selling the leased property. The property was offered to Floyd and Company in accordance with the first refusal covenant, and the corporation refused the offer. Also the written agreement of the gas company was released and an oral agreement substituted. Thereafter the petitioner bought the leased property, and the Commissioner determined that part of the consideration had been furnished by Floyd and Company. In holding that the waiver of the contract right by the corporation did not constitute distribution of property to the shareholder, the Court used language quoted in footnote 9 of the appendix.

The foregoing observations that waiver of a contract right by a corporation does not constitute distribution of property are especially pertinent to the instant matter. In effect the Boys' Market, Inc. waived its contract right to rent the San Gabriel property for less than fair market rental value. However, in paying $75,000 to the petitioners for property that was worth $75,000, the corporate assets were not diminished. The balance sheet could reflect no distribution.

In *Robert Lehman v. Comm.* (1955), 25 TC 629, a corporation distributed to the shareholders of its parent company warrants entitling the shareholders to buy six cases of whisky for each share of stock owned, at a price the same as that charged to regular customers. The Commissioner contended that the shareholders

realized ordinary income on the profit from sale of such warrants, under the theory that the transaction was an anticipatory assignment of income by the parent; that the profit realized by the shareholders on sale of the warrants was in effect a dividend. In holding that the transaction did not result in a taxable dividend, the Court made comments quoted in footnote 10 of the appendix.

These cases bring out the principle that the courts look only to the actual value of what a corporation receives from a shareholder in exchange for a payment. They do not insist that a shareholder be treated on the same basis as a person unrelated to the corporation. In fact, the rule stated by the Tax Court that the lack of "arms length" relationship between the parties requires a close scrutiny is for the very purpose of insuring that in such cases fair value will be received. Fair market value was received by the Boys' Market, Inc. when it bought the property for $75,000; moreover, the said corporation had a business purpose in acquiring the property. The actual value to the lessee was greater to the lessee than to anyone else [Tr. 101].

The Gregory Principle.

The inapplicability of Gregory v. Helvering, regardless of any inference that might be drawn as to tax savings motives, has been well expressed in the Sun Properties decision quoted at length in previous briefs. The factual difference between Sun Properties and the instant situation, stressed by the respondent and the Tax Court, does not appear to have any relevance to the basic principle, which does apply herein. No valid distinction between the two cases was shown.

The Supreme Court in Gregory was careful to reaffirm that a motive to avoid taxation will not establish tax liability if the transaction without such

motive does not establish liability. The many later decisions that involve the substance v. form question have been equally careful to preserve this basic distinction.

If the transaction in question was real, with substantive legal consequences, then the motive to reduce or avoid tax is immaterial. But if the transaction can be held to be a sham then the form will be disregarded. The effect of the *Gregory* decision was excellently summarized by Judge Learned Hand in *Chisholm v. Comm.* (C. C. A. 2; 1935), 79 F. 2d 14 as quoted in footnote 11 of the appendix.

There can be no question that Joe Goldstein and his wife actually acquired the San Gabriel property; that they had full legal and equitable title thereto; that the corporation as a separate entity had a legal choice whether to accept or refuse the offer by the petitioners to sell the property at the price asked. No legal rights arose between the petitioners and the corporation with respect to the property until an agreement was executed between the parties pursuant to the said offer. The transactions most certainly were real, with substantive legal consequences within the meaning of the Gregory and Chisholm decisions. Although the Gregory principle is inapplicable, no other theory for the Tax Court's determination was ever stated.

Conclusion.

It is respectfully submitted that the decision and judgment of the Tax Court of the United States should be reversed as clearly erroneous or as adduced from an erroneous view of the law.

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APPENDIX.

[1]*Gillette's Estate v. Comm* (C. A. 9), 182 F. 2d 1010:

"[3] It is to be noticed that the Tax Court's statement of the evidence in its 'Memorandum' incorporates the material evidence adduced by petitioner and that the respondent introduced no evidence. The error complained of is asserted to exist in the inferences or conclusions drawn by the Tax Court therefrom. In such circumstances it has been said in cases appealed from district courts that within certain limits we are free, that is, that we have the power (and we would suppose the duty) to draw such inferences or conclusions as we deem proper. . . . And since I. R. C. Sec. 1141(a) has been amended to provide that reviews from Tax Courts shall be in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury, what we have just said is germane here. See Wright-Bernet, Inc. v. Commissioner, 6 Cir., 1949, 172 F. 2d 343. Rule 52(a) of the Rules of Civil Procedure provides that findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. However, as will be seen from a reading of the following passage from the oft-referred to case of United States v. United States Gypsum Co., 1948, 333 U. S. 364, 394, 395, 68 S. Ct. 525, 541, 92 L. Ed. 746, the clearly erroneous doctrine of Rule 52(a) is a limitation on Courts of Appeals and precludes such courts from entirely disregarding the trial tribunal's conclusions and trying the case wholly de novo upon the evidence adduced: 'In so far as (the findings to be considered) * * * are inferences drawn from documents or undisputed facts * * * Rule 52(a) of the Rules of Civil Procedure is applicable. That rule prescribes that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where "clearly erroneous." The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'

"We have carefully considered the effect on this case of subsection (c)(1) of I. R. C. Sec. 1141 after the above-mentioned amendment to subsection (a) of such section. Does the limitation of power on review to 'modify or to reverse' the Tax Court

only when its decision is 'not in accordance with law' contained in (c)(1) remain effective in the face of the provision in the amended (a) in which the review provided is to be 'in the same manner and to the same extent as [review of] decisions of the district courts in civil actions tried without a jury.'? We think it clear, if there is a conflict, which we doubt, that the appellate power must be construed in conformance with the later enacted (a). In the way we view the evidence in the instant case, as will more clearly be shown hereinafter, the decision is 'not in accordance with law' because we think every part of the substantial evidence properly related to the whole of the evidence points unmistakably to the conclusion that it is wrong. Since we are reviewing the case in the same manner and to the same extent as a decision of the district court, and we are applying all of the elements and limitations mentioned in the Gypsum case, we are of the opinion that clearly a mistake has been made and therefore the decision is 'clearly erroneous.'

"[4] It is commonly stated, and properly so, that due respect should be given to the Tax Court's expertness in tax matters. While in most circumstances such respect would weigh heavily, we are not impressed by it here where the ultimate inference of fact must be as to what the decedent contemplated as the driving reason for his actions regarding his property. In this duty, which does not bring technical tax questions into play, it is in no way derogatory to the Tax Court to say that United States Courts of Appeals are as well equipped to draw inferences as is the Tax Court and for that reason the Tax Court decision calls for little more weight than its logic suggests."

[2]*Clark v. Comm.* (C. A. 9), 266 F. 2d 698:

"If the taxpayer introduces evidence from which the determination of the Commissioner contained in a deficiency notice could be found inaccurate then the presumption disappears. Gertsen v. Commissioner of Internal Revenue (February 27, 1959, page 6), 9 Cir. ..... F. 2d ..... [3 AFTR 2d 931]; Clinton Cotton Mills v. Commissioner of Internal Revenue (1945), 4 Cir., 78 F. 2d 292 [16 AFTR 380], 295; Russell v. Commissioner of Internal Revenue (1939), 1 Cir., 45 F. 2d 100 [9 AFTR 519], 103. See also Niederkrome, et al. v. Commissioner (November 10, 1958, page 3), 9 Cir., 261 F. 2d 643 [2 AFTR 2d 6155]; Lawrence v. Commissioner of Internal Revenue (1944), 9 Cir., 143 F. 2d 456, [32 AFTR 998], 459; Hemphill Schools, Inc. v. Commissioner of Internal Revenue, supra, 964. Thereafter the Commissioner has the burden of proving the existence and amount of the deficiency. Lesly Cohen v. Commissioner of Internal Revenue (April 8, 1959, page 8), 9 Cir., 266 F. 2d 5 [3 AFTR 2d 1164]. The tax court's determination must then rest on all of the evidence introduced and its ultimate determination must find support in credible evidence. Union Stock Farms v. Commissioner of Internal Revenue (March 9, 1959, page 19), 9 Cir., 265 F. 2d 712 [3 AFTR 2d 952]."

[3]*Gensinger v. Comm.* (C. A. 9), 208 F. 2d 576:

"[12, 13] We are mindful that findings of the Tax Court on questions of fact are conclusive unless clearly erroneous. Grace Bros., Inc. v. Commissioner of Internal Revenue, 9 Cir., 173 F. 2d 170. But the facts material to the question whether the taxpayer distributed the apricot and peach crops to himself were substantially undisputed. The question whether a distribution was effected, as we see it, depends simply on what the taxpayer actually intended, with a requirement that his intention be objectively manifested in some manner. We think the error of the Tax Court was in applying a stricter rule. But if this was not the error, then we think the finding of the Tax Court on the question was clearly erroneous."

[4]*Blackmer v. Comm.* (C. C. A. 2, 1934), 70 F. 2d 255:

"When the evidence before the Board, as the trier of the facts, ought to be convincing, it may not say that it is not. *Sioux City Stockyard Co. v. Comm.,* 59 F. (2d) 944 (C. C. A. 8); *Conrad & Co. v. Comm.,* 50 F. (2d) 576 (C. C. A. 1); *Chicago Ry. Equipment Co. v. Blair,* 20 F. (2d) 10 (C. C. A. 7). And the Board may not arbitrarily discredit the testimony of an unimpeached taxpayer so far as he testifies to facts. A disregard of such testimony is sufficient for our holding that the taxpayer has sustained the burden of establishing his right to a reduction and error has been committed in a contrary ruling. *Boggs & Buhl v. Comm.,* 34 F. (2d) 859 (C. C. A. 3)."

[5]*Tank v. Comm.* (C. A. 6, 1959), 270 F. 2d 477:

"The Tax Court cannot reject the evidence of all of the witnesses and, upon a record containing no evidence to support its decision, make a determination that salaries are excessive. *J. H. Robinson Truck Lines v. Commissioner,* 183 F. 2d 739 (39 AFTR 788). 'Since the Commissioner offered no evidence, the petitioner was denied the opportunity of examining the correctness of his computations; and was left to stand upon its own proof, none of which was refuted. Therefore, we think, the burden of presenting evidence to rebut any presumption in favor of the Commissioner's findings were fully met, and the Tax Court clearly erred in finding that the salaries were unreasonable.'"

[6]*A & A. Tool and Supply Co., et al. v. Comm.* (C. A. 10), 182 F. 2d 300:

"The Commissioner determined that $600 per year was a reasonable rental for the premises occupied by the taxpayer and allowed that amount as an expense deduction. The taxpayer claimed that a reasonable annual rental was $3,000. This was the issue before the Tax Court. Mrs. Schuster testified that she was the owner of the property. That it consisted of 19 lots 140 feet deep with a frontage of 655 feet upon which was a metal warehouse equipped with racks and hoists on the inside and a

loading dock on the outside and a modern five room residence which was occupied by the taxpayer's manager; that she was acquainted with the property and had made an investigation of rentals in that neighborhood; that she was President of the corporation which occupied the premises and participated daily in the conduct of its business; that in her opinion $3,000 per annum was a fair rental value for the property. This was the only evidence before the Tax Court as to the reasonable rental value of the property. The Tax Court stated that Mrs. Schuster's testimony was not entitled to much weight. We agree that the evidence was far from satisfactory but she was the owner of the property and had sufficient knowledge of the same to testify as to its reasonable rental value. With this evidence in the record, we cannot conclude that there was no substantial evidence from which the tax court could make a finding of the reasonable rental value. The presumption that the Commissioner's determination is correct is one of law; it is not evidence and may not be given weight as such. *N. Y. Life Ins. Co. v. Gamer,* 303 U. S. 161, 171, 58 S. Ct. 500, 82 L. Ed. 726, 114 A. L. R. 1218. When evidence is introduced by the taxpayer sufficient for the Tax Court to base a finding contrary to the determination, the presumption disappears. *Crude Oil Corp. of Am. v. Commissioner,* 10 Cir., 161 F. 2d 809; *Mayson Manufacturing Co. v. Commissioner,* 6 Cir., 178 F. 2d 115, 121. The Tax Court and the Board of Tax Appeals, which it succeeded, was created to afford a taxpayer an independent forum where he could be heard speedily, equitably and impartially on a tax assessment which he thought had been improperly levied or assessed. Its function is to weigh evidence on matters properly before it and make findings of fact thereon, and when there is substantial evidence to support the findings or when they are not clearly erroneous they must be accepted. *Helvering v. Kehoe,* 309 U. S. 277, 60 S. Ct. 549, 84 L. Ed. 751. It may not arbitrarily discredit and disregard unimpeached, competent and relevant testimony of a taxpayer which is uncontradicted. There was sufficient evidence as to this item to overcome the presumption of correctness of the Commissioner's determination and the Tax Court should not have disregarded it."

[7]*Lucas v. Ox Fibre Brush Co.* (1930), 281 U. S. 115:

"The payments in the present instance were actually made in the year 1920. The expenses represented by these payments were incurred in that year, for it is undisputed that there was no prior agreement or legal obligation to pay the additional compensation. This compensation for past services, it being admitted that it was reasonable in amount in view of the large benefits which the corporation has received as the fruits of these services, the corporation had a right to pay, if it saw fit. There is no suggestion of attempted evasion or abuse. The payments were made as a matter of internal policy having appropriate regard to the advantage of recognition of skill and fidelity as a stimulus to continued effort. There was nothing in the income tax law to preclude such action."

[8]*Hugh Walling* (1953), 19 T. C. 838:

"The action of the Corporation, recognized this adjustment by putting journal entries on its books, as of December 31, 1946, increasing the value of such assets and recording a liability in the same amount to petitioner, as a direct result of such adjustments by the respondent. In effect, there was a reformation of the contract of September 16, 1946. While it may be true that the Corporation was not legally obligated to make such adjustment, there is no prohibition against parties to a contract amending it, and that is what occurred in this case."

[9]*Morris E. Floyd* (1955), 14 T. C. M. 835, T. C. Memo. 1955-209:

"Respondent also determined that the waiver by Floyd and Company of its right to purchase the property constituted a distribution to petitioners, but in his brief respondent has offered no explanation for this holding. The facts are briefly as follows. The lease between the Gas Company and Floyd and Company provided that if during the term of the lease the Gas Company desired to sell the property it would afford Floyd and Company an opportunity to make an offer for the property before entertaining any other offers. The Gas Company offered to sell the building to Floyd and Company for $19,000. The board of directors of Floyd and Company, because they were contemplating taking on the Bendix washer and needed working capital and because they saw no real advantage in the purchase, rejected the offer on September 14, 1948. This left the Gas Company free to offer the property to any other person, firm or corporation, and Floyd contracted on October 18, 1948 to purchase the building for $19,000. The price was later reduced to $11,000 because the walls were found to be defective. By declining to purchase the premises for $19,000 Floyd and Company did not bestow a property right upon petitioners, and regardless of whether petitioners made a good bargain, the transaction did not include a taxable distribution of income."

[10]*Robert Lehman v. Comm.* (1955), 25 T. C. 629:

"The 'bargain' nature of the transaction arises out of the fact that the purchasers were, because of price fixing regulations in effect at that time, able to immediately resell the whiskey at a higher price. Although a real economic benefit was conferred upon the stockholders of Park & Tilford, Inc., a benefit similar in nature was conferred upon the regular customers of the Import Corporation to whom it sold whiskey at the same price. Not every such benefit conferred upon a stockholder is to be regarded as resulting in the distribution of a dividend. The Supreme Court, in *Palmer v. Commissioner,* 302 U. S. 63, 69 (1937) (37-2 USTC Par. 9532), has stated the rule as follows:

" '* * * While a sale of corporate assets to stockholders is, in a literal sense, a distribution of its property, such a transaction does not necessarily fall within the statutory definition of a divi-

dend. For a sale to stockholders may not result in any diminution of its net worth and in that case cannot result in any distribution of its profits.'"

[11]*Chisholm v. Comm.* (C. C. A. 2, 1935), 79 F. 2d 14:

"The Commissioner believes that the situation falls within *Gregory v. Helvering,* 293 U. S. 465, 55 S. Ct. 266, 79 L. Ed. 596. It is important to observe just what the Supreme Court held in that case. It was solicitous to reaffirm the doctrine that a man's motive to avoid taxation will not establish his liability if the transaction does not do so without it. It is true that the court has at times shown itself indisposed to assist such efforts, *Mitchell v. Board of Commissioners of Leavenworth County,* 91 U. S. 206, 23 L. Ed. 302, and has spoken of them disparagingly, *Shotwell v. Moore,* 129 U. S. 590, 9 S. Ct. 362, 32 L. Ed. 827; but it has never, so far as we can find, made that purpose the basis of liability; and it has often said that it could not be such. The question always is whether the transaction under scrutiny is in fact, what it appears to be in form; a marriage may be a joke; a contract may be intended only to deceive others; an agreement may have a collateral defeasance. In such cases the transaction as a whole is different from its appearance. True, it it always the intent that controls; and we need not for this occasion press the difference between intent and purpose. We may assume that purpose may be the touch stone, but the purpose which counts is one which defeats or contradicts the apparent transaction, not the purpose to escape taxation which the apparent, but not the whole, transaction would realize. In *Gregory v. Helvering,* supra, 293 U. S. 465, 55 S. Ct. 266, 79 L. Ed. 596, the incorporators adopted the usual form for creating business corporations; but their intent, or purpose, was merely to draught the papers, in fact not to create corporations as the court understood that word. That was the purpose which defeated their exemption, not the accompanying purpose to escape taxation; that purpose was legally neutral. Had they really meant to conduct a business by means of the two reorganized companies, they would have escaped whatever other aim they might have had, whether to avoid taxes, or to regenerate the world."

No. 17318

In the United States Court of Appeals for the Ninth Circuit

JOE GOLDSTEIN and LILLIAN GOLDSTEIN,
PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 19-30) are not reported.

JURISDICTION

This petition for review (R. 32-33) involves federal income taxes for the taxable year 1953. On January 9, 1958, the Commissioner of Internal Revenue mailed to the taxpayers a notice of deficiency in the sum of $28,404.13. (R. 9-13.) Within ninety

days thereafter and on February 5, 1958, the taxpayers filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 272(a) of the Internal Revenue Code of 1939. (R. 5-9.) The decision of the Tax Court was entered December 27, 1960. (R. 31.) The case is brought to this Court by a petition for review filed January 19, 1961. (R. 32-33.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the Tax Court erred in finding as a fact that the $40,000 profit realized by taxpayers on the sale of property to their family corporation three weeks after they had purchased it is taxable as ordinary income in the form of a disguised dividend, instead of as a short term gain on the sale of a capital asset.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 115. DISTRIBUTIONS BY CORPORATIONS.
>
> (a) *Definition of Dividend.*—The term "dividend" * * * means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings and profits of the taxable year * * *
>
> * * * *
>
> (26 U.S.C. 1952 ed., Sec. 115.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

* * * *

(2) [as amended by Sec. 150(a)(1), Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 322(c)(2), Revenue Act of 1951, c. 521, 65 Stat. 452] *Short-term capital gain.*—The term "short-term capital gain" means gain from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such gain is taken into account in computing gross income;

* * * *

(26 U.S.C. 1952 ed., Sec. 117.)

STATEMENT

The facts, as found by the Tax Court (R. 20-26), some of which were stipulated (R. 15-18), may be summarized as follows:

Taxpayers, Joe and Lillian Goldstein, are husband and wife living in Los Angeles, California. In 1925, when only seventeen years old, Joe Goldstein, the oldest of five brothers—the others being Max, Edward, Bernard, and Albert—started a retail grocery business as a sole proprietorship. As his marketing business expanded, Joe employed his brothers and in this way gave them their start in his business. On or before September 27, 1945, this business became a limited partnership with Joe as the sole general partner, and Edward and Joe, as trustee for Max, as limited partners. (R. 20.)

On September 27, 1945, the limited partnership leased a parcel of land located on the corner of a major intersection in San Gabriel, California, from Torley Land Company for a term of fifty years beginning November 1, 1945. Joe had previously attempted to buy the land but had been unable to agree on the terms with J. B. Torley, majority stockholder in Torley Land Company. The lease provided for a rental of $40,000 payable in installments of $800 per year. The lease allowed the lessee to assign the lease, but unless the written consent of the lessor was secured, the lessee would not be released or discharged from any obligations thereafter accruing. (R. 20-21.)

On January 1, 1946, this lease, along with all the other assets of the limited partnership was assigned or transferred to a California corporation, The Boys' Market, Inc., in exchange for its capital stock. The Boys' Market, Inc. had been incorporated in 1936 but had remained inactive until this transfer. When notified of the assignment of the lease, the lessor's attorney advised that the partnership was not released from its obligations under the lease. (R. 20, 21-22.)

Thereafter from time to time, Joe tried to purchase the fee in this land for the business. The minutes of a meeting of the board of directors of the corporation held on January 27, 1953, state that the president (Joe) reported that it might be possible to purchase the land on which the corporation had built the San Gabriel market (sometime in 1947 or 1948 the corporation had constructed on the leased

premises a market building which it subsequently used as one of its eight retail stores). According to Joe Goldstein, the purchase would enable the corporation to secure a loan on the property and thus increase its working capital. The president and secretary were thereupon authorized to "make such purchase, if the price was satisfactory, and to arrange a loan on terms and conditions they deemed proper considering our loan agreement." (R. 22.) The loan agreement just referred to had been negotiated in 1950 by the corporation with Provident Mutual Life Insurance Company of Philadelphia. Under its terms the corporation borrowed $400,000 secured by a mortgage on all of its real estate and fixed property including the company office and the store in San Gabriel. The note agreement and mortgage contained certain restrictive covenants (R. 296) which, among other things, imposed some limitations on the corporation's borrowing and divided activities (R. 22, 25-26).

During the taxable year in question, 1953, the corporation had issued and outstanding 5,500 shares of capital stock, which were held as follows (R. 24):

Name	Number of shares
Joe Goldstein	2,720
Joe and Lillian Goldstein as joint tenants	150
Lillian Goldstein as trustee for minor children	36
Edward Goldstein (brother of Joe)	1,294
Max Goldstein (brother of Joe)	1,271
Dorothy Goldstein (wife of Bernard Goldstein, brother of Joe) as trustee for her minor children	24
Everett Eddy	5
Total	5,500

The officers of the corporation were (R. 24):

Joe Goldstein	President
Edward Goldstein	Vice President
Albert Goldstein	Vice President
Max Goldstein	Vice President
Everett Eddy	Secretary-treasurer
Bernard Goldstein	Assistant secretary-treasurer

The directors of the corporation were (R. 24):

Joe Goldstein	Edward Goldstein
Lillian Goldstein	Albert Goldstein
Max Goldstein	Bernard Goldstein
	Everett Eddy

The five brothers worked in various supervisory capacities in the business, with Joe as the principal executive officer and general manager. (R. 25.) He was the dominant figure in the corporation; he had control of its policies and made the executive and administrative decisions. The other stockholders and directors owed their livelihoods to him. (R. 28-29.) The brothers received salaries from the corporation and bonuses when profits justified them. During the year 1953 and on December 31, 1953, the corporation had accumulated earnings and profits and available cash in excess of $75,000 and maintained a "triple A" rating with Dun & Bradstreet. Nevertheless, it did not pay regular dividends, and although it had net earnings for 1953, the corporation did not formally declare and pay a dividend that year. (R. 25.)

Max, Edward, and Bernard obtained their stock in the company by investing their bonuses in the business from time to time. Albert, the youngest

brother, never owned any stock. Everett Eddy, first employed as bookkeeper for the business in 1936, acquired his shares of stock by gift from Max. He kept the company's books and records and prepared minutes of the formal meetings of the directors, though when the brothers discussed matters together informally, minutes of such meetings were not always recorded. (R. 25.)

On April 28, 1953, at a meeting of the board held about four months after the meeting of January 27, 1953, mentioned above, the prior discussion about the possibility of purchasing the San Gabriel property was mentioned and the board then decided "that Joe Goldstein and Lillian Goldstein would buy this land as their private property, and they may at some time in the future, sell it to The Boy's [sic] Market." (R. 22.) Torley Land Company had refused to accept cash for the San Gabriel property but insisted upon an exchange for land and an apartment house in Las Vegas, worth $35,000. For various reasons discussed *infra*, the corporation declined to accept the exchange but, as indicated above, deferred to taxpayers and permitted them to negotiate with Torley Land Company in their own behalf.

As a result of further negotiations with Torley Land Company sometime before June 22, 1953, Joe entered into an agreement with Torley whereby taxpayers would buy a lot in Las Vegas, Nevada, where Torley's president lived, and build an apartment house thereon for a total cost to taxpayer of $35,000, and upon completion of the construction taxpayers would trade the Las Vegas property to Torley for the

San Gabriel property with no cash involved. Escrows to carry out this agreement were executed on June 22, 1953, and Joe and Lillian put up $35,000 of their own money to carry it out. The transaction was completed on December 8, 1953, on which date Joe and Lillian conveyed the Las Vegas property to Torley Land Company, and received in exchange a deed for the fee to the San Gabriel property, subject to the lease held by the corporation. The transaction was worked out this way at the request of Torley Land Company which had a tax basis of a little over $10,000 in the San Gabriel property. (R. 23.)

On December 31, 1953, Joe and Lillian conveyed the San Gabriel real estate to The Boys' Market, Inc., by quitclaim deed, for the sum of $75,000 in cash, thus receiving $40,000 in excess of the cost to them of the property. There were no minutes recorded in the corporation's minute book which showed a consideration of or authorization for the consummation of this transaction by the board of directors of the corporation.

The taxpayers recognized the $40,000 profit as short-term capital gain which they offset against an unused capital loss carryover. (Ex. 1.) The Commissioner, however, determined that the profit was a disguised dividend to be treated as ordinary income and therefore assessed a deficiency of $28,404.13. (R. 9-13.) On the basis of the evidence presented to it, the Tax Court found as a fact that of the $75,000 received by taxpayers, only $35,000 was paid as consideration for the property; the remaining

$40,000 was a dividend. (R. 26.) The taxpayers then petitioned for review of the Tax Court decision. (R. 32-33.)

SUMMARY OF ARGUMENT

The Tax Court concluded that on the basis of the evidence the corporation paid only $35,000 as consideration for the San Gabriel property; the remaining $40,000 was a disguised dividend distribution. Excessive payments for property to controlling shareholders have consistently been treated as dividends by the courts; and this has been true even if the transaction was neither void nor voidable under state law, because the incidence of federal transaction does not depend on the form utilized to transfer legal title in property. Whether in any one case such a payment is a dividend is a question of fact, the decision as to which is to be upheld unless clearly erroneous. It is submitted that the evidence in this case supports the finding that the other profit realized was a dividend.

Joe Goldstein was the dominant figure in the business who as president and chairman of the board exercised general supervision over the business and coordinated its activities. It was he who initiated and executed the various business deals and profit ventures. His control and his having a large unused capital loss carryover encourage the conclusion that he arranged the transaction to siphon off corporate earnings under the guise of receiving a short term gain.

The total absence of any business purpose strengthens this conclusion. The corporation's subsequent sale and leaseback of the property obliterated the only reason advanced for the corporation purchasing the property in the first place. Moreover, one of taxpayers' own witnesses testified that it was contrary to the Corporation's policy to own real estate, a statement Joe Goldstein himself never adequately explained.

The corporation's extremely favorable long-term lease on the property at a rental of only $800 per year and its purchase from its majority shareholders for more than twice the amount the most reliable evidence shows was the fair market value removes all doubt as to the purpose and nature of the transaction. Taxpayers paid $35,000 for the property. Cost, particularly when that cost is incurred only three weeks before, following negotiations with an acknowledged skillful trader is persuasive evidence of fair market value, especially when the seller (Torley Land Company) declares that because of an unfavorable lease it was impossible to get more than $40,000 for the property and that $35,000—the actual selling price—was reasonable.

Thus taxpayers sold property to their family corporation at a price greatly in excess of both what they paid for it and of the fair market value at a time when the corporation had ample earned surplus to distribute. To secure an untaxed distribution of this earned surplus, taxpayers utilized a two-step transaction, with the first phase the securing by taxpayers of the property at the price ($35,000), the

corporation would have paid, and with the second phase the sale to their controlled corporation at an excessive price ($75,000), the excess representing a disguised dividend distribution.

The fact that taxpayers retained the property for only twenty-three days before selling it to their family corporation shows they regarded its purchase as a mere stepping stone, a fact Joe Goldstein in effect admitted. Furthermore, the reasons advanced by taxpayers as to why they, rather than their corporation, purchased from Torley Land Company are implausible and inconsistent with each other. The fears of violating the loan agreement with Provident Mutual or becoming involved in interstate commerce were too speculative and unlikely and the brothers' personal dislike of Las Vegas because of financial reverses suffered there too inconclusive to be persuasive that as a business matter of dollars and cents the corporation would prefer to spend over twice as much for the property by purchasing it from a California resident.

No one factor determines that the payment was in reality a dividend; instead all factors must be considered. Moreover, as the Tax Court properly recognized, the fact that the transaction was tax-motivated, not arm's length, and unusual, only warranted that it be subjected to a careful scrutiny. The evidence which this careful scrutiny revealed amply supported the Tax Court's conclusion that the corporation paid to taxpayers $40,000 as a dividend in disguise.

ARGUMENT

The Tax Court Did Not Err When It Found That The Profit Of $40,000 Realized By Taxpayers On The Sale Of Property To Their Controlled Corporation Was A Disguised Dividend And That Only $35,000 Of The Total $75,000 Purchase Price Paid By The Corporation Was Consideration For The Property

The question confronting the Court in this case is whether the Tax Court's action was clearly erroneous when it found that the $40,000 profit realized by taxpayers on the sale of property to their family corporation only three weeks after they had purchased it was in reality a disguised dividend taxable as ordinary income. The taxpayers urge that it is and insist that the profit was a short term capital gain, a gain they offset in their income tax return against a capital carry-over. In support of their position, taxpayers claim that under California law their sale of the property to the corporation was neither void nor voidable (R. 9-13). While it is true that state law is determinative of the nature of the interests created by the sale, federal law controls the manner and extent to which these interests will be taxed. *United States* v. *Security Tr. & Sav. Bk.*, 340 U.S. 47, 49; *Morgan* v. *Commissioner*, 309 U.S. 78; *In re Sweet's Estate*, 234 F. 2d 401 (C.A. 10th), certiorari denied, 352 U.S. 878; *Pitts* v. *Hamrick*, 228 F. 2d 486 (C.A. 4th). For this reason, although the sale to the corporation may be perfectly valid under California law,[1] nevertheless, the

[1] Though the taxpayers' brief implies the contrary, the Tax Court did not state or find that the sale was void or

incidence of taxation is determined by the Tax Court's finding on the basis of all the evidence presented to it that of the $75,000 received by taxpayers for the property, only $35,000 was paid as consideration while the remaining $40,000 represented a distribution of corporate earnings. (R. 26.)

Whether payment by a corporation is consideration for property, compensation, rent, loan, gift, etc., or in reality a dividend is a question of fact. *Clark* v. *Commissioner*, 266 F. 2d 698 (C.A. 9th); *Lengsfield* v. *Commissioner*, 241 F. 2d 508 (C.A. 5th); *Heil Beauty Supplies* v. *Commissioner*, 199 F. 2d 193 (C.A. 8th). Though the finding is necessarily based on inferences drawn from basic facts, nevertheless it too is to be upheld unless clearly erroneous. *Commissioner* v. *Duberstein*, 363 U.S. 278; *Weyl-Zuckerman & Co.* v. *Commissioner*, 232 F. 2d 214 (C.A. 9th). The issue itself is not a new one to this or other courts which have subjected transactions between shareholders and their close corporations to careful scrutiny: *Magnus* v. *Commissioner*, 259 F. 2d 893, 903 (C.A. 3d); *Crabtree* v. *Commissioner*, 221 F. 2d 804 (C.A. 2d), affirming *per curiam*, 22 T.C. 61; *Levine* v. *Commissioner*, 24 T.C. 147 (excessive price paid by corporation to shareholder for property taxed as dividend); *Utter-McKinley Mortuaries* v. *Commissioner*, 225 F. 2d 870 (C.A. 9th) and *Limericks, Inc.* v. *Commissioner*, 165 F. 2d 483 (C.A. 5th) (corporation denied deduction for excessive rent); *Clark* v. *Commissioner*, *supra* (tax-

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voidable under California law, and its decision in no way depends on such a finding.

payer charged with receiving dividend, not loan); *Perel & Lowenstein, Inc.* v. *Commissioner*, 237 F. 2d 908 (C.A. 6th) (corporation denied deduction for excessive compensation); Cf. *Byers* v. *Commissioner*, 199 F. 2d 273 (C.A. 8th), certiorari denied 345 U.S. 907.

No one factor is decisive in determining whether the corporate payment was actually a disguised distribution of corporate earnings. Instead the trier of fact must consider and weigh all the different factors involved in the transaction before reaching its conclusion. This is what the Tax Court did in the instant case, and as this court has ruled in other similar cases, its finding of fact will be upheld unless clearly erroneous or unless such finding is adduced from an erroneous view of the law. *Clark* v. *Commissioner, supra*; *Utter-McKinley Mortuaries* v. *Commissioner, supra*. The evidence in this case supports fully the conclusion that only $35,000 was received by taxpayers as consideration for the property and that the excess $40,000 paid by taxpayers' corporation to taxpayers was a disguised dividend. And, in arriving at such an ultimate finding the lower court applied the law as enunciated by the Congress and as layed down by this and other appellate courts.

The testimony made it clear and the Tax Court found (R. 28-29) that Joe Goldstein was the dominant figure in the corporation. As president and chief executive, he exercised general supervision over the business as a whole, coordinating its activities and overlooking the performances of his brothers. (R. 68, 152, 162, 207.) It was Joe who had begun

the business as a sole proprietorship in 1925 (R. 60-61) and who was the sole general partner when the San Gabriel property was first leased (R. 16, 64). It was his idea to incorporate and cease operations of the limited partnership. (R. 209.) At the time of the transaction in question, he, together with his wife, owned a majority of the shares of stock of the corporation. (R. 17.) It was Joe's idea to lease the San Gabriel property in the first place (R. 209) and he bore the brunt of the negotiations, with some assistance from Eddy (R. 158). He later negotiated with J. B. Torley the purchase of the property for the corporation prior to his purchasing the property for himself. While his two brothers who testified displayed almost total ignorance both of the terms of the lease on the San Gabriel property and the pros and cons with respect to the corporation's purchase of it (R. 122-124, 146-148), Joe, on the other hand, revealed a firm grasp of the essentials.

Based on this control and his having a large unused capital loss carryover, it is not difficult to conclude that he arranged the transaction under examination of siphon off earnings under the pretense of receiving a short-term capital gain.[2] The lack of any formal appraisal prior to the corporation's purchase, the lack of any record in the minutes of the corporate books of either Eddy's investigation of San Gabriel's fair market value or the meeting authoriz-

[2] However, consideration of the additional tax advantage is not necessary to the result reached by the lower court, which found sufficient facts to establish a corporate payment which was essentially equivalent to a dividend.

ing purchase, all support the Tax Court's conclusion that the others in the corporation, who "owed their livelihoods to Joe and [who] would have agreed that the corporation do anything legitimate that Joe suggested" (R. 29), readily acquiesced in the plan he developed to secure himself a tax-free dividend.

The absence of any sound business purpose to the corporation's purchase for $75,000 further points up taxpayer's control and makes his scheme even more blatant. At the time of the purchase in December, 1953, the corporation had over forty-two years remaining on an extremely favorable lease on the property under the terms of which they paid the insignificant sum of $800 rental per year. (R. 20, 21.) Both taxpayer's expert appraiser and a large stockholder in Torley Land Company, Ray E. Torley, agreed that Boys' Market, Inc., was in a very favorable position as lessee. (R. 103, 279.) Nevertheless, though over the next forty-two years the corporation would pay less than $34,000 in rent, it decided to purchase the fee for $75,000. Equally revealing and at the same time confusing is the testimony of Everett Eddy that it was contrary to the corporation's policy to own real estate (R. 54) and that subsequently the corporation entered into a sale-lease-back arrangement with respect to this property (R. 58). If the corporation purchased the property to increase its loaning capacity, it is difficult to understand how it could even contemplate a sale-lease-back arrangement.

Not only did the corporation purchase property on which it had a very long and very favorable lease,

but it also paid an exhorbitant price to its controlling shareholders, not only to Torley Land Company, and it did this only twenty-three days after taxpayers had themselves purchased the property for $35,000. Confronted with this set of circumstances and the following testimony: Ray E. Torley that it is "impossible" to sell for $40,000 property subject to a 50-year lease with an $800 rental (R. 279); Everett Eddy that the price—not more than $40,000 (R. 278-279), which Torley Land Company was asking for the San Gabriel property—was too high (R. 49); and Joe Goldstein that he could not even consider retaining a $35,000 piece of property which returned only $800 per year as rental income (R. 251), the Tax Court was more than justified in finding that the corporation paid to taxpayers only $35,000 as consideration for the property (R. 26).

Taxpayers insist that they received from the corporation only the fair market value of the property. As support they point to the testimony of the independent appraiser who valued the property at $79,600 (R. 95) and Eddy's testimony that he received the figure of $75,000 from the Bank of America (R. 59). Taxpayers have neglected to explain that no evidence indicates that either of these valuations explicitly took into consideration the effect of the lease. The Bank of America's appraisal was mere hearsay and taxpayer's expert at the trial admitted that because of the terms of the 50-year lease the lessee was in a very favorable position. (R. 103.)

Fair market value has most frequently been defined as that price which a willing buyer would give to a willing seller after negotiations in which neither party was acting under compulsion. *Commissioner* v. *Marshman*, 279 F. 2d 27, 28 (C.A. 6th); *In re Williams' Estate*, 256 F. 2d 217, 218 (C.A. 9th); *Fitts' Estate* v. *Commissioner*, 237 F. 2d 729, 731 (C.A. 8th). Opinion evidence of the type presented by taxpayers is not binding. *Sartor* v. *Arkansas Gas Corp.*, 321 U.S. 620, 627; *In re Williams' Estate*, *supra*, p. 219. Cost, however, is often considered persuasive evidence of fair market value (*Guggenheim* v. *Rasquin*, 312 U.S. 254; *Duke* v. *Commissioner*, 200 F. 2d 82 (C.A. 2d), certiorari denied, 345 U.S. 906), and this should be especially true in this case in which only three weeks before the sale in question taxpayers purchased the property from a party with an adverse economic interest, Torley Land Company, after negotiations in which neither was acting under compulsion. Furthermore, on the basis of J. B. Torley's experience in dealing with real estate and Joe Goldstein's acknowledgment that Torley was a skilled negotiator ("horse trader") (R. 214, 222) it is unlikely that Joe Goldstein secured an unfair advantage. Torley Land Company was reluctantly obliged to recognize that because of the unfavorable lease, the land could not be sold for $40,000 and $35,000 was a reasonable price. (R. 278.)

Not only therefore did taxpayers sell property to their family corporation for a price greatly in excess

of what they paid for it only three weeks before, but they also sold it at a price greatly in excess of what the most persuasive evidence shows was the fair market value. In view of the subsequent sale and lease back, the only reasonably possible purpose for the purchase and sale to the corporation was the desire to secure a tax-free dividend. To gain this tax-free dividend, taxpayers resorted to a step transaction, with the first phase their securing the property at the price ($35,000) the corporation would have paid and with the second phase the sale to the controlled corporation at an excessive price ($75,000), the excess representing a disguised dividend distribution. Cf. *Commissioner* v. *Court Holding Co.*, 324 U.S. 311.[3]

After all, taxpayers sold the property only twenty-three days after they bought it. This alone is strong evidence that they considered their purchase only as a stepping stone. Moreover, the various reasons advanced by the taxpayers as to why the corporation declined to purchase the San Gabriel property directly from Torley Land Company were understandably brushed aside by the Tax Court as "inconsistent with each other and implausible". (R. 28.)

In light of taxpayers' willingness to stipulate that at all times The Boys' Markets had sufficient earned surplus to have paid for whatever they did in cash

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[3] At page 334, the Supreme Court explains "The incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains for a sale of property are not finally to be determined solely by the means employed to transfer legal title."

(R. 242), it is not clear or persuasive why or how Everett Eddy feared a violation of the restrictive covenant in the corporation's loan agreement with Provident Mutual (R. 296). In what way the purchase of land in Las Vegas would involve the corporation in interstate commerce and affect its wages and hours policies was also never explained, and furthermore no evidence was offered that the corporation had ever sought legal advice. (R. 237.) Moreover, Eddy stated that ownership of real estate was contrary to the policy of the corporation (R. 54-55) whereas taxpayer Joe Goldstein claimed that it was advantageous for the corporation to own a ground fee and when confronted with the contradiction never adequately resolved it. (R. 252).

Taxpayer's brothers purportedly opposed purchase of property in Las Vegas because of financial reverses and embarrassment suffered there (R. 110, 142) but they never claimed to have lost as much as $40,000, the extra price their corporation paid by purchasing from taxpayers instead of from Torley Land Company. Joe's desire to rid himself and his estate, should he die, of the partnership's liability to Torley Land Company by purchasing the fee (R. 224, 229) did not require that he, instead of the corporation, purchase the land. Finally, Joe in fact admitted that his purchase of the property was only a stepping stone to the later sale to his corporation when he ridiculed the idea of his retaining "a $35,000 piece of property with a $800 per year return, which happens to be approximately two and three-quarters percent return." (R. 251.)

It therefore is not surprising that the Tax Court discounted the reasons offered by taxpayers as to why they, rather than their corporation, purchased from Torley Land Company, and thus ignored the form utilized by taxpayers to effectuate their purpose of securing the tax-free dividend.[4]

Taxpayers both in the Tax Court and here have relied extensively on *Sun Properties* v. *United States*, 220 F. 2d 171 (C.A. 5th) (Br. 13-19), which they urge, holds that a sale need not be disregarded because tax-motivated, not an arm's length transaction, and not done in the usual way. The issue in that case was whether a purported sale of property by a controlling shareholder to his corporation was in reality a contribution to capital. It is indeed true that in *Sun Properties* the court refused to disregard the form of a transaction only because the transaction was tax-motivated, not arm's length, and not done in the usual way, but it is also true that after listing the factors which tend to prove that a transaction is a contribution to capital and examining the evidence, the court concluded at page 175, "we do not

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[4] The Tax Court, however, did not, as taxpayers imply (Br. 11-12), hold that the taxpayers bought the property as agents of the corporation. It is true, though, that in light of the facts that Joe Goldstein tried to buy the land for the corporation, negotiated its lease, then again tried to buy the land, and that the minutes of a board meeting read, "It has now been decided that Joe and Lillian Goldstein would buy this land as their private property, and they may at some time in the future, sell it to the Boys' Market" (R. 22), such a finding would have been supported by substantial evidence.

find a particle of proof that it was in fact a contribution to capital nor that it was intended as such".

The instant case, however, is very different and taxpayer's reliance on *Sun Properties* is therefore misplaced. The Tax Court did not rule adversely to taxpayers because the transaction was tax-motivated, not arm's length, and not done in the usual way. It only explained that because of these factors, the transaction warranted a careful scrutiny (R. 26), as was also pointed out in *Sun Properties*, pp. 173-174, and, having subjected the transaction to careful scrutiny, found that the excess price received by taxpayers over what they paid for the property was a disguised dividend, a finding amply supported by the evidence. The inconsistency and implausibility of the reasons offered as to why the corporation did not purchase the land directly from Torley Land Company, taxpayer's ownership of a majority of the corporation's stock, Joe's control and domination over the corporation, the existence of a large earned surplus and absence of a formally declared dividend for 1953, the taxpayers having a very large unused capital-loss carryover, the very favorable lease held by the corporation on the land, the subsequent sale and leaseback by the corporation, and finally the exhorbitant price received by taxpayers all support the Tax Court's findings and conclusions.

This Court has ruled that a corporation may grant a dividend which is neither proportionately distributed among the shareholders nor formally declared. *Clark* v. *Commissioner*, 266 F. 2d 698. This is what the Tax Court found happened in this case: tax-

payers received as a result of a plan they developed, a plan which was actually not even subtle, a disguised dividend which is taxable as ordinary income.

CONCLUSION

For the reasons given, the decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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Acting Assistant Attorney General.

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SEPTEMBER, 1961.

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No. 17318

United States Court of Appeals

for the Ninth Circuit

JOE GOLDSTEIN and LILLIAN GOLDSTEIN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court of the United States

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Tax Court of the United States

Docket No. 71831

JOE GOLDSTEIN AND LILLIAN GOLDSTEIN,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Appearances

Walter M. Campbell, Esq., 403 Subway Terminal Bldg., 417 South Hill Street, Los Angeles 13, California.

GENERAL DOCKET

1958

Feb. 5—Petition filed. Fee paid 2/5/58. Served Feb. 6, 1958.

Feb. 5—Request by petr. for trial at Los Angeles, Calif. Action Granted 2/6/58. Served Feb. 6.

April 1,—Answer by resp. filed. Served April 2.

1959

Nov. 9—Notice of trial at Los Angeles, Calif. Jan. 18, 1960. Served Nov. 9.

Jan. 21—Trial before Judge Drennen—Los Angeles, Calif. Stip. of facts w/joint exhibits 1-A thru 4-D. Petitioners Brief due March 8, 1960. Respondents Brief due April 7, 1960. Petitioners Reply Brief due April 22, 1960. Submitted to Judge Drennen.

1960 Under Submission

Feb. 23—Transcript of Hearing 1/21, 1/22, 1960 filed. Served Mar. 8.

March 7—Brief for Petr. filed. Served March 8.

April 6—Motion by resp. for extension of time to April 14 to file Brief in Answer. Granted Apr. 7. Served Apr. 8.

April 14—Resp. Brief in Answer filed (6). Served April 15.

April 27—Motion by petr. for extension of time to May 9 in which to file Answering Brief. Granted 4/27/60. Served Apr. 28.

May 9—Reply Brief for Petr. filed (4). Served May 9.

Submitted to Judge Drennen

Dec. 27—Memo Findings of Fact and Opinion filed Judge Drennen. Decision will be entered for the Respondent. Dec. 27.

Respondent. Served. Dec. 27.

Dec. 27—Decision entered, Judge Drennen. Dec. 27.

1961 Appellate Proceedings

Jan. 19—Petition for Review by U. S. C. A. 9th Cir. filed by petrs.

Jan. 19—Notice of Filing Pet. for Review with proof of Service of attachments thereto filed.

Jan. 19—Designation of Contents of Record on Review filed by petrs.

Jan. 19—Proof of Service of Designation of Contents of Record filed.

Feb. 20—Order enlarging time to file record on review and docket pet. for review to April 19, 1961. Served Feb. 20.

Tax Court of the United States

Docket No. 71831

JOE GOLDSTEIN and LILLIAN GOLDSTEIN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioners hereby petition for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (Ap:LA:AA-HT 90D:JMC,) dated January 9th, 1958, and as a basis thereof allege as follows:

1. Petitioners are now, and have been at all pertinent times, husband and wife, residing at 85 Fremont Place, Los Angeles 5, California.

2. The return for the period here involved was filed with the District Director of Internal Revenue for the Los Angeles District.

3. The notice of deficiency, a copy of which is attached and marked "Exhibit A," was mailed to petitioners on or about January 9th, 1958.

4. The deficiencies as determined by the Commissioner are in income taxes for the taxable year ended December 31st, 1953, as follows:

Nature of Tax: Income Tax;

Deficiency Determined: $28,404.13.

5. The determination of tax set forth in said notice of deficiency is based upon the following errors:

A. The Commissioner has erroneously determined that petitioners received dividends not reported by them in the amount of $40,000.00;

B. The Commissioner has erroneously disallowed a deduction for medical expenses in the amount of $1,859.53.

6. The facts upon which petitioners rely as a basis for this proceeding are as follows:

A. In the notice of deficiency the respondent informed petitioners that:

"It is determined that $40,000.00 of the amount of $75,000.00 received by you in the year 1953 as the sales price of a parcel of real property 'sold' to the Boy's Market, Inc., constitutes the distribution of a dividend, taxable as ordinary income under the provisions of Section 22 of the Internal Revenue Code of 1939."

Petitioners allege that the $40,000.00 referred to above was, in fact, a capital gain realized upon the sale of a nondepreciable asset, to-wit, land, to the said The Boy's Market, Inc., a corporation; and that said amount was not a dividend. Petitioners allege in support thereof the following:

(1) That on or about the 27th day of September, 1945, The Boy's Market, a limited copartnership consisting of the petitioner Joe Goldstein, as general partner, and Edward Goldstein and Joe Goldstein, as trustee for Max Goldstein, limited partners, leased a certain parcel of land situate in the City of San Gabriel, State

of California, from one Torley Land Company, a corporation, for a term of 50 years from and after the 1st day of November, 1945, upon consideration of the erection of a building of certain specifications and value upon said premises, the payment of annual rent as reserved in said lease, and the keeping of other terms and conditions as provided for therein. That thereafter, and on or about January 1st, 1946, the said lease was assigned to The Boy's Market, Inc., a corporation, which assumed the obligations therein set forth. That under and by virtue of the terms of said lease, petitioner Joe Goldstein remained personally liable to the Lessor, Torley Land Company, or its assigns, for the performance of the terms of said lease.

(2) That during the calendar year 1953 and at all pertinent times, petitioner herein, either directly or as trustees for their minor children, owned 52.8% of the issued capital stock of said The Boy's Market, Inc., a corporation.

(3) That on or about June 22nd, 1953, petitioners and the said Torley Land Company, a corporation, entered into a contract wherein the said Torley Land Company agreed to sell, and petitioners agreed to buy, the said land in the City of San Gabriel, California, referred to above, subject to the lease aforesaid, in consideration of the petitioners' equity in an apartment building to be constructed in the City of Las Vegas, Nevada; that petitioners did thereafter acquire land and construct the said apartment building in Las Vegas at a total cost of $35,000.00, which said land and apartment building were thereafter conveyed to the said Torley Land Company; and on or about De-

cember 8th, 1953, the said land in the City of San Gabriel, State of California, was conveyed to petitioners, as joint tenants, subject to the matters set forth in a policy of title insurance issued by Title Insurance & Trust Company on December 8th, 1953, a copy of which is attached hereto and marked "Exhibit B."

(4) That thereafter, and on or about the 31st day of December, 1953, petitioners sold said real property to The Boy's Market, Inc., a corporation, for a total consideration of $75,000.00, which said amount was not more than its fair market value at the date of its acquisition by petitioners and at the date of said sale to The Boy's Market, Inc.

(5) That the officers, directors, and stockholders of said The Boy's Market, Inc., a corporation, were at all times acquainted with, and in possession of, all information relative to the property involved, including the details of the acquisition thereof by petitioners, and undertook the said transaction independently and not as the result of any dominion, control, pressure, or influence brought to bear by these petitioners, or either of them, and to the advantage of said corporation, and for the business purposes thereof.

B. That the adjustment to medical expenses as proposed by the Commissioner is brought about as a result of the increase in adjusted gross income by the Commissioner's proposed treatment of Item A, above, and by reason of the facts, as stated above, is not justified. That the amount of medical deduction claimed on the income tax return of petitioners was correctly set forth thereon.

Wherefore, petitioners pray that the Tax Court may hear these proceedings, and:

1. That the Court determine that there is no deficiency in the income tax liability of petitioners for the taxable year ended December 31st, 1953; and

2. That the Court grant such other relief as may be proper.

Respectfully submitted,

/s/ WALTER M. CAMPBELL,
Counsel for Petitioners.

Duly verified.

Form 1230 (App.)

(Seal) EXHIBIT A

U. S. Treasury Department
Internal Revenue Service
Regional Commissioner
1250 Subway Terminal Building
417 South Hill Street
Los Angeles 13, California

Replying Refer to
Ap:LA:AA-HT
90D:JMC

Mr. Joe Goldstein and
Mrs. Lillian Goldstein
Husband and Wife
85 Fremont Place
Los Angeles 5, California

Jan 9 1958

Dear Mr. and Mrs. Goldstein:

You are advised that the determination of your income tax liability for the taxable year(s) ended De-

cember 31, 1953, discloses a deficiency or deficiencies of $28,404.13, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with the Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, 417 South Hill Street, Los Angeles 13, California. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,

RUSSELL C. HARRINGTON
Commissioner,
/s/ By H. L. DUCKER

Enclosures:

Statement

Form IRS Pub. No. 160

Agreement Form

Associate Chief, Appellate Division

RCSF 901567
Ap:LA:AA-HT
90D:JMC

Statement
Mr. Joe Goldstein and
Mrs. Lillian Goldstein
Husband and Wife
85 Fremont Place
Los Angeles 5, California

Tax Liability for the Taxable Year Ended
December 31, 1953

Year		Deficiency
1953	Income Tax	$28,404.13

In making this determination of your income tax liability, careful consideration has been given to the report of examination, a copy of which was forwarded to you on February 25, 1957, to your protest dated March 26, 1957, and to the statements made at a conference held on October 2, 1957.

A copy of this letter and statement has been mailed to your representative, Mr. Walter M. Campbell, 417 South Hill Street, Suite 403, Los Angeles 13, California, in accordance with the authority contained in the power of attorney executed by you.

Adjustments To Net Income
Year 1953

Net income as disclosed by return		$45,852.73
Additional income and unallowable deductions:		
(a) Dividends	$40,000.00	
(b) Medical deduction	1,859.53	41,859.53
Net income as corrected		$87,712.26

Explanation of Adjustments

(a) It is determined that $40,000.00 of the amount of $75,000.00 received by you in the year 1953 as the sales price of a parcel of real property "sold" to the Boy's Market, Inc., constitutes the distribution of a dividend, taxable as ordinary income under the provisions of Section 22 of the Internal Revenue Code of 1939.

(b) As a result of the increase in adjusted gross income made by item (a), the medical deduction has been adjusted as follows:

Adjusted gross income disclosed by return	$55,887.13
Add: (a) Dividends	40,000.00
Adjusted gross income as corrected	$95,887.13
Medical expenses paid per return	$ 7,934.82
Less: 5% of $95,887.13	4,794.35
Medical deduction allowable	$ 3,140.47
Claimed in return	5,000.00
Increase in income	$ 1,859.53

Computation of Tax

Net income	$87,712.26
Less: Exemptions (6)	3,600.00
Amount subject to tax	$84,112.26
Joint return (one-half)	$42,056.13
Tax on one-half	$23,016.415
Joint return (multiplied by 2)	$46,032.83
Correct income tax liability	$46,032.83
Income tax disclosed by return, Account No. 232850217, Los Angeles District	17,628.70
Deficiency in income tax	$28,404.13

Received and Filed Feb. 5, 1958.
Served Feb. 6, 1958.

[Title of Tax Court and Cause.]

ANSWER

The Respondent, in answer to the petition filed in the above-entitled case, admits and denies as follows:

1 to 4, inclusive. Admits the allegations contained in paragraphs 1 to 4, inclusive, of the petition.

5. A and B. Denies that the respondent erred as alleged in subparagraphs A and B of paragraph 5 of the petition.

6. A. Admits the allegations contained in the first unnumbered paragraph of subparagraph A of para-

graph 6 of the petition; denies the allegations contained in the second unnumbered paragraph of subparagraph A of paragraph 6 of the petition.

(1) to (5), inclusive. Denies the allegations contained in subsections (1) to (5), inclusive, of subparagraph A of paragraph 6 of the petition.

B. Denies the allegations contained in subparagraph B of paragraph 6 of the petition.

7. Denies generally each and every allegation of the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the deficiency determined by the respondent be in all respects approved.

/s/ ARCH M. CANTRALL,
Chief Counsel,
Internal Revenue Service.

Of Counsel:
Melvin L. Sears,
Regional Counsel,
J. Earl Gardner,
Attorney
Internal Revenue Service,
1135 Subway Terminal Building,
417 South Hill Street,
Los Angeles 13, California.

Received and Filed April 1, 1958.
Served April 2, 1958.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated That, for the purpose of this case, the following statements may be accepted as facts, and all exhibits referred to herein and attached hereto are incorporated in this Stipulation and made a part hereof; provided, however, that either party may introduce other and further evidence not inconsistent with the facts herein stipulated.

1. Petitioners are now and have been at all pertinent times, husband and wife, residing at 85 Fremont Place, Los Angeles 5, California.

2. The petitioners reported their income upon a calendar year basis and filed a timely return for the calendar year ending December 31, 1953, with the District Director of Internal Revenue for the Los Angeles District, a copy of which return is attached hereto and marked Exhibit 1-A.

3. The Notice of Deficiency, a copy of which is attached to the petition herein and marked Exhibit A thereto, was served timely upon the petitioners herein, who thereupon and within the time prescribed by law, filed their Petition to the Tax Court of the United States.

4. The deficiency in income tax, to wit, $28,404.13, as set forth in said Notice of Deficiency, arises entirely from a transaction in 1953 treated by petitioners as a sale of a capital asset, but treated by the Commissioner as a receipt of dividends, by which adjustment the Commissioner proposed to increase ordinary income re-

ceived by the petitioners by the sum of $40,000.00, and to decrease the allowance for medical deductions by the sum of $1,859.53, which latter adjustment is occasioned solely by the increase of ordinary income as aforesaid.

5. That on and prior to September 27, 1945, the petitioner, Joe Goldstein, was the sole general partner in a limited co-partnership consisting of himself as general partner and of Edward Goldstein and Joe Goldstein (as Trustee for Max Goldstein) limited partners; that said partnership operated under the fictitious name of "The Boys' Market."

6. That on September 27, 1945, The Boys' Market, a limited co-partnership, leased a certain parcel of land situated in the City of San Gabriel, State of California, from Torley Land Company, a corporation, for a term of fifty years from and after the first day of November, 1945, that a true copy of said lease may be received in evidence and marked Exhibit 2-B, and reference is made to all of the terms and conditions of said lease as though fully set forth herein at this point.

7. That the Boys' Market, Inc., a corporation, was incorporated on June 19, 1936, but commenced business as of January 1, 1946, as of which date the assets of The Boys' Market, a limited co-partnership, were exchanged for shares of the capital stock of the said corporation.

8. That thereafter, and on January 1, 1946, the said lease was assigned by The Boys' Market, a limited co-partnership, as aforesaid, to The Boys' Market, Inc., a corporation, which said corporation thereafter assumed

possession of said property under the terms of said lease; a copy of which assignment may be received in evidence and marked Exhibit 3-C; that thereafter and in 1948 The Boys' Market, Inc. erected a building on said property in conformity with the terms of the lease hereinabove referred to.

9. That The Boys' Market, Inc. is the owner and operator throughout Los Angeles County, of a number of large supermarkets retailing groceries, meats, vegetables and sundries.

10. That during the calendar year 1953, and at all pertinent times thereafter, there were issued and outstanding a total of fifty-five hundred (5,500) shares of the capital stock of the said The Boys' Market, Inc., which said shares were the property of the following named individuals in the amounts set opposite their names:

Name	No. of Shares
Joe Goldstein	2720
Joe and Lillian Golstein as joint tenants	150
Lillian Goldstein, as Trustee for minor children	36
Edward Goldstein (brother of Joe)	1294
Max Goldstein (brother of Joe)	1271
Dorothy Goldstein (wife of Bernard Goldstein, brother of Joe) as Trustee for her minor children	24
Everett Eddy	5
Total	5500

That the officers of said corporation were as follows:

Joe Goldstein	President
Edward Goldstein	Vice-President
Albert Goldstein	Vice-President
Max Goldstein	Vice-President
Everett Eddy	Secretary-Treasurer
Bernard Goldstein	Assistant Secretary-Treasurer

That the directors of said corporation were as follows:

Joe Goldstein	Everett Eddy
Lillian Goldstein	Edward Goldstein
Max Goldstein	Albert Goldstein
	Bernard Goldstein

11. That said property is located at a major intersection in the City of San Gabriel, to wit, the southeast corner of Valley Boulevard and Del Mar Avenue in said city, and consists of a parcel having 338 ft. on Valley Boulevard and 370 ft. on Del Mar Avenue.

12. Attached hereto and marked Exhibit 4-D is a copy of the Revenue Agent's Report sent to Petitioner on February 25, 1957.

/s/ WALTER M. CAMPBELL,
Counsel for Petitioners,

/s/ HART H. SPIEGEL,
Chief Counsel,
Internal Revenue Service,
Counsel for Respondent.

Filed Jan. 21, 1960.

[Title of Tax Court and Cause.]

Docket No. 71831. Filed December 27, 1960.

MEMORANDUM FINDINGS OF FACT AND OPINION

Petitioners, owning over 50 per cent of the stock of a family corporation, acquired real estate, on which the corporation held a very favorable long-term lease and on which it operated a market, for $35,000 and immediately resold it to the corporation for $75,000, offsetting the short-term gain against a capital loss carryover on their personal return. Held, the $40,000 profit realized by petitioners was a disguised dividend from the corporation and taxable to petitioners as ordinary income.

Walter M. Campbell, Esq., for the petitioners.

Thomas F. Greaves, Esq., for the respondent.

Drennen, Judge: Respondent determined a deficiency in petitioners' income tax for the calendar year 1953 in the amount of $28,404.13. The only issue is whether a gain of $40,000, realized by petitioners on the sale of real estate, which they had purchased for $35,000 on December 8, 1953, to their family corporation for $75,000 on December 31, 1953, was taxable as ordinary income or as gain on the sale of a capital asset. Petitioners reported the gain as a short-term capital gain and offset it against a $112,944.77 capital loss carryover. Respondent determined that the gain was in the nature of a dividend and taxable as ordinary income.

Findings of Fact.

Some of the facts were stipulated and are so found.

Petitioners are husband and wife living in Los Angeles, California. They filed a joint income tax return for the calendar year 1953 with the district director of internal revenue for the district of Los Angeles.

Joe Goldstein, the oldest of five brothers, the others being Max, Edward, Bernard, and Albert, started a retail grocery business as a sole proprietorship in 1925 when he was 17 years old. Joe gave each of his brothers his start in business by employing them in his expanding marketing business. On or before September 27, 1945, this business became a limited partnership with Joe as the sole general partner, and Edward and Joe, as trustee for Max, as limited partners. The partnership operated under the name the Boys' Market.

The Boys' Market, Inc., a California corporation, and hereafter referred to as the corporation, was incorporated in 1936 but was inactive until January 1, 1946, at which time all the assets of the limited partnership were transferred to it in exchange for capital stock of the corporation.

On September 27, 1945, the limited partnership leased a parcel of land situate on the corner of a major intersection in San Gabriel, California, from Torley Land Company for a term of 50 years beginning November 1, 1945. Joe had previously attempted to buy the land for a market site but had been unable to agree with

Torley on terms. The lease provided for rental of $40,000 payable in installments of $800 per year during the term thereof, and contained no provision for renegotiation. Among other things the lease required the lessee to construct on the property at its own expense a commercial business building costing at least $20,000. The building was to be completed by November 1, 1946; otherwise lessee was required to post bond as security for completion of the building. All buildings constructed on the premises during the term of the lease were to become a part of the realty, to be delivered to the lessor upon termination of the lease. Lessee was required to pay all taxes, insurance, and other charges against the property. Lessee was entitled to assign the lease, provided that if the lease was assigned prior to completion of and payment for the original building, the lessee was to remain liable for the performance of all covenants of the lease as though no assignment had been made; if assigned after completion of the building the lessee would not, without the written consent of the lessor, be released or discharged from any obligations thereafter accruing.

This lease was assigned to the corporation, along with the other assets of the partnership, in 1946. The lessor was notified of the assignment and its attorney acknowledged receipt of the notice by letter dated March 28, 1946, which also advised the partnership that it was not exonerated from its obligations under the

lease and that lessor was not releasing the partnership. A market building was constructed on the leased premises by the corporation sometime in 1947 or 1948 and was thereafter occupied by the corporation as one of its eight retail stores.

From time to time after the lease was executed Joe unsuccessfully sought to purchase the fee in this land for the business. The minutes of a meeting of the board of directors of the corporation held on January 27, 1953, state that the president (Joe) reported that it might be possible to purchase the land on which the corporation built the San Gabriel market, and that the purchase of the land would enable "us" to procure a loan on the property and increase "our" working capital. The president and secretary were thereupon authorized to "make such purchase, if the price was satisfactory, and to arrange a loan on terms and conditions they deemed proper considering our loan agreement."

The minutes of a subsequent meeting of the board of directors of the corporation held on April 28, 1953, after referring to the previous discussion about the possibility of purchasing the San Gabriel property, stated: "It has now been decided that Joe Goldstein and Lillian Goldstein would buy this land as their private property, and they may at some time in the future, sell it to The Boy's Market." All of the directors were recorded as being present at this meeting.

As a result of further negotiations with Torley Land Company sometime before June 22, 1953, Joe entered into an agreement with Torley whereby petitioners would buy a lot in Las Vegas, Nevada, where Torley's president lived, and build an apartment house thereon for a total cost to petitioners of $35,000, and upon completion of the construction petitioners would trade the Las Vegas property to Torley for the San Gabriel property with no cash involved. Escrows to carry out this agreement were executed on June 22, 1953, and Joe and Lillian put up $35,000 of their own money to carry it out. The transaction was completed on December 8, 1953, on which date Joe and Lillian conveyed the Las Vegas property to Torley Land Company, and received in exchange a deed for the fee to the San Gabriel property, subject to the lease held by the corporation. The transaction was worked out this way at the request of Torley Land Company which had a tax basis of a little over $10,000 in the San Gabriel property.

On December 31, 1953, Joe and Lillian conveyed the San Gabriel real estate to "The Boy's Market, Inc.," by quitclaim deed, for the sum of $75,000 in cash, thus receiving $40,000 in excess of the cost to them of said property. There were no minutes recorded in the corporation's minute book which showed a consideration of or authorization for the consummation of this transaction by the board of directors of the corporation.

During the year 1953 the corporation had issued and outstanding 5,500 shares of capital stock, which were held as follows:

Name	Number of shares
Joe Goldstein	2,720
Joe and Lillian Goldstein as joint tenants	150
Lillian Goldstein as trustee for minor children	36
Edward Goldstein (brother of Joe)	1,294
Max Goldstein (brother of Joe)	1,271
Dorothy Goldstein (wife of Bernard Goldstein, brother of Joe) as trustee for her minor children	24
Everett Eddy	5
Total	5,500

The officers of the corporation were:

Joe Goldstein	President
Edward Goldstein	Vice President
Albert Goldstein	Vice President
Max Goldstein	Vice President
Everett Eddy	Secretary-treasurer
Bernard Goldstein	Assistant secretary-treasurer

The directors of the corporation were:

Joe Goldstein	Edward Goldstein
Lillian Goldstein	Albert Goldstein
Max Goldstein	Bernard Goldstein
	Everett Eddy

The five brothers worked in various supervisory capacities in the business, with Joe as the principal executive officer and general manager. The brothers received salaries from the corporation, and bonuses when profits justified them. Max, Edward, and Bernard obtained their stock in the company by investing their bonuses in the business from time to time. Albert, the youngest brother, never owned any stock.

Everett Eddy was first employed as bookkeeper for the business in 1936. He acquired his shares of stock by gift from Max. As secretary-treasurer and a director of the corporation in 1953 Eddy was responsible for keeping the books and records of the company and for preparing minutes of the directors meetings. Some of the directors meetings were held informally as the brothers discussed matters among themselves in the offices of the corporation, and minutes of such meetings were not always recorded. At the more formal meetings of the directors Eddy took notes during the meeting from which he wrote up formal minutes within a few days to a month thereafter.

The corporation was successful and had a "triple A" rating with Dun & Bradstreet. It did not pay regular dividends and, although it had net earnings for 1953, it did not formally pay a dividend that year. The corporation had accumulated earnings and profits and available cash in excess of $75,000 during the year 1953 and on December 31, 1953.

The corporation entered into a loan agreement with Provident Mutual Life Insurance Company of Philadelphia in 1950 under which it borrowed $400,000, se-

cured by a mortgage on all of its real estate and fixed property including the company office and the store in San Gabriel. The note agreement and mortgage contained certain restrictive covenants which, among other things, limited the corporation's borrowing and dividend activities to some extent.

The transaction whereby petitioners acquired the San Gabriel property from Torley Land Company and immediately sold it to the corporation for a cash profit of $40,000 was not an arm's-length transaction. Of the $75,000 paid to petitioners by the Boys' Market, Inc., for the property in 1953, $40,000 was not in fact consideration for the sale or exchange of a capital asset; it represented a distribution of corporate earnings.

Opinion.

The question is whether the $40,000 profit realized by petitioners on their sale of the San Gabriel business property to their family corporation is taxable to petitioners as gain on the sale of a capital asset, or as ordinary income in the form of a disguised dividend.

This is a question of fact and this case must be decided on its own particular facts. The fact that the transaction was not at arm's length is not in itself a basis for disregarding the form of the transaction but it invites careful scrutiny as to whether all phases of the transaction were in fact what they purport to be in form; and this is particularly true here where the principal stockholders of a family corporation resell property to the corporation at a profit of over 100 per cent a few days after they acquired it.

Petitioners attempt to explain why the property was first acquired by petitioners and then sold to the corporation, rather than being acquired directly by the corporation, by evidence to the effect that Torley would not sell the property for cash but would only trade it for investment property in Las Vegas; that the brothers, as directors, would not permit the corporation to enter into such a transaction because, by reason of their own personal unpleasant experiences in Las Vegas, they would have nothing to do with anything in Las Vegas; that it was against company policy to own the property on which its markets were located; that for some unexplained reason Eddy thought such a transaction might violate the corporation's loan agreement with Provident Mutual Life Insurance Company of Philadelphia; and that entering into this transaction might involve the corporation in interstate commerce which for some unexplained reason might affect the wages and hours of its employees.

Petitioners further attempt to explain why they were so anxious to acquire this particular property, which the corporation held under a very favorable long-term lease, on the grounds that Joe was anxious to be relieved of the personal liability for performance of the lease which he had assumed as the general partner of the original lessee under the lease, and that the corporation was anxious to acquire the fee in the property so it could borrow money on it and could also use it for a sale and leaseback agreement with other parties.

No effort was made by petitioners to justify the profit of over 100 per cent petitioners made by reselling

this property to their controlled corporation in the same month they acquired it, except to attempt to show that the property itself was worth $75,000 at the time. The only evidence of this value was the testimony of Eddy that he made some inquiry of the Bank of America as to the value of the property for loan purposes, and the testimony of an experienced independent appraiser who appraised the property a few days before the trial and gave his opinion that the value of the property as of 1953 was about $79,000. This witness gave no satisfactory explanation of the effect on this value of the lease which still had 42 years to run at an annual rental of $800, particularly to a prospective purchaser who held the lease. The evidence indicates that Joe himself would not pay more than $35,000 for the property because of the favorable lease. The corporation, as holder of the lease, should have been in a better position to bargain for the property than anyone else.

It requires little analysis of the various reasons given to conclude that many of them are not only inconsistent with each other and implausible, but even if accepted as a whole would not reasonably explain why the corporation would refuse to enter into this transaction directly with Torley but would be willing to let its president and principal stockholder buy the property for $35,000 and immediately resell it to the corporation for $75,000. Based on our examination of all the evidence and our observation of the witnesses on the witness stand, we are convinced that Joe Goldstein was the dominant character in the corporation, that he had control of its policies and made the executive and administrative decisions, that the other stock-

holders and directors owed their livelihoods to Joe and would have agreed that the corporation do anything legitimate that Joe suggested, and that the real reason the transaction here involved was carried out in the manner and on the terms described was to permit the corporation to acquire a higher tax basis in the San Gabriel property and at the same time permit Joe to withdraw $40,000 from the accumulated earnings of the corporation at a time when it could be offset against Joe's capital loss carryover and thus result in no tax to Joe.

It is quite apparent that the objective of all concerned with the corporation was to get the title to the San Gabriel property in the corporation and that this could easily have been accomplished in behalf of the corporation for $35,000, by use of an agent or someone acting for the corporation if necessary, without exposure of either the corporation or its stockholders to any of the alleged problems which worried them, and that a direct acquisition by the corporation would just as well accomplish the objectives of all parties as would the indirect transaction.

We do not believe the corporation, with its favorable lease, would have paid $75,000 for this property to an outsider. This is supported by the fact that its president and principal stockholder, Joe, had refused to pay more than $35,000 for the property when negotiating in behalf of the corporation. We do not think the corporation would have paid more than $35,000 for the fee to this property. Consequently, we have found as a fact that only $35,000 of the $75,000 paid by the corporation to petitioners was consideration for the

property, and that the remaining $40,000 was a disguised dividend to petitioners. It will be taxed accordingly. Albert E. Crabtree, 22 T.C. 61, affirmed per curiam 221 F. 2d 807 (C.A. 2, 1955); Sidney v. LeVine, 24 T.C. 147; H. K. L. Castle, 9 B.T.A. 931; secs. 22(a) and 115(a), I.R.C. 1939. Cf. Palmer v. Commissioner, 302 U.S. 63.

Sun Properties v. United States, 220 F. 2d 171 (C.A. 5, 1955), is heavily relied on by petitioners but is clearly distinguishable on the facts. The question there was whether the transfer of depreciable property to a wholly owned corporation was a sale or a contribution of capital. Here the question is whether a part of the sum paid by the corporation to the principal stockholder ostensibly as part of the purchase price of the land was in fact a disguised dividend. Accepting all the legal principles set forth in the Sun Properties case and applying those that are pertinent to the facts here would not, in our opinion, require a different conclusion than we have reached. The same is true of Warren H. Brown, 27 T.C. 27, also cited by petitioners. See Aqualane Shores, Inc. v. Commissioner, 269 F. 2d 116 (C.A. 5, 1959), affirming 30 T.C. 519, wherein the Court of Appeals for the Fifth Circuit distinguished its own Sun Properties case on the facts.

It follows that respondent's determination of the amount of medical expense deductible is also correct.

Decision will be entered
for the respondent.

Served Dec. 27, 1960.

Tax Court of the United States
Washington

Docket No. 71831.

JOE GOLDSTEIN and LILLIAN GOLDSTEIN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion filed December 27, 1960, it is

Ordered and Decided: That there is a deficiency in income tax for the taxable year 1953 in the amount of $28,404.13.

[Seal] /s/ W. M. DRENNEN,
Judge.

Entered and Served Dec. 27, 1960.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW

Joe Goldstein and Lillian Goldstein, the petitioners in the above-entitled matter, by Walter M. Campbell, their attorney, hereby file their Petition for Review by the United States Court of Appeals for the Ninth Circuit of the decision by the Tax Court of the United States, entered on December 27, 1960, ... Tax Court ....., Memo. 1960-276, determining deficiencies in the petitioners' joint Federal income taxes for the calendar year 1953 in the amount of $28,404.13; and said petitioners respectfully show:

I.

Jurisdictional Statement

The petitioners are residents of the Southern District of California and filed their joint income tax return for the calendar year 1953 with the Director of Internal Revenue at Los Angeles, California; that, pursuant to the provisions of Section 7482(b)(1) of Title 26, U.S. Code, the venue for review of said decision is the United States Court of Appeals for the Ninth Circuit.

II.

Nature of Controversy

Joe Goldstein and Lillian Goldstein are and were during the calendar year 1953, husband and wife, and filed a joint income tax return for said year.

The controversy arises from the holding of the Commissioner of Internal Revenue that the gain on the sale of a single parcel of real estate to a corporation of which the taxpayers owned directly or held in trust for minor children 2,906 shares out of a total of 5,500 outstanding, constituted a dividend rather than a short term capital gain as reported by the taxpayers.

III.

Relief Sought

The said petitioners, being aggrieved by the Findings of Fact and Conclusions of Law contained in the Memorandum Findings of Fact and Opinion of the Court, and by its decision pursuant thereto, desire to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

/s/ WALTER M. CAMPBELL,
Attorney for Petitioners.
668 S. Bonnie Brae Street,
Los Angeles 57, California.

Duly Verified.

Received and Filed Jan. 19, 1961.

[Title of Tax Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON REVIEW

To the Clerk of the Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the Petition for Review heretofore filed by the above-named petitioners:

(1) The docket entries of all proceedings before the Tax Court;

(2) Pleadings before the Tax Court as follows:

(a) Petition;

(b) Answer.

(3) The Written Stipulation of Facts filed with the Tax Court;

(4) All Exhibits filed with the Tax Court; [omitted]

(5) Transcript of the testimony received by the Tax Court;

(6) Findings of Fact and Opinion of the Tax Court;

(7) The Decision of the Tax Court;

(8) The Petition for Review;

(9) This designation of contents of record on review.

/s/ WALTER M. CAMPBELL,
668 S. Bonnie Brae Street,
Los Angeles 57, California,
Attorney for Petitioners.

Affidavit of Service by Mail Attached.

Received and Filed Jan. 19, 1961.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the documents submitted under this certificate, 1 to 14, inclusive, as called for by the Designation of Contents of Record on Review, and the Rules, are the original documents of record on file in my office, and a true copy of the docket entries as they appear in the official docket of my office, in the case docketed at the above number, in which the petitioners in this Court have filed a petition for review.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 23rd day of March, 1961.

/s/ HOWARD P. LOCKE,
Clerk of the Court.

[Endorsed]: Filed March 28, 1961. Frank H. Schmid, Clerk.

The Tax Court of the United States

Docket No. 71831

JOE GOLDSTEIN and LILLIAN GOLDSTEIN,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Court of Appeals Courtroom, Federal Building, Los Angeles, California, Thursday, January 21, 1960.

Pursuant to notice, the above entitled matter came on for hearing at 9:30 o'clock, a.m.

Before: Honorable William M. Drennan, Judge.

Appearances: Walter M. Campbell, Esq., 417 South Hill Street, Los Angeles, California, appearing for the Petitioners.

Thomas F. Greaves, Esq., 1135 Subway Terminal Building, Los Angeles 13, California, appearing for the Respondent. [1]*

* * * * *

EDWARD L. EDDY,

called as a witness for and on behalf of the Petitoners, having been first duly sworn, was examined and testified as follows:

The Clerk: Would you state your name and your address?

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*Page numbers appearing at top of page of Original Transcript of Record.

(Testimony of Edward L. Eddy.)

The Witness: Edward L. Eddy, 1784 Kaweah Drive, Pasadena, California.

The Clerk: Mr. Eddy, spell your last name, please.

The Witness: E-d-d-y.

The Clerk: Thank you.

Direct Examination

By Mr. Campbell:

Q. Now, please keep your voice up, Mr. Eddy. The acoustics in this courtroom are very bad.

A. I will try.

Q. Very well. What is your business or occupation, Mr. Eddy?

A. I am employed by the Boys Markets.

Q. And what is your official capacity?

A. At the present time I am executive vice president and treasurer.

Q. And how long have you been associated with the Boys Markets, a corporation? [34]

A. Over 23 years. As a corporation?

Q. As a corporation.

A. Since January 1st, 1946.

Q. Was that the date that it commenced doing business? A. The corporation?

Q. Yes.

A. Yes.

Q. The corporation itself had been incorporated some time prior to that time, had it not?

A. Yes, it had.

Q. But had not been activated, is that correct?

A. That is right.

(Testimony of Edward L. Eddy.)

Q. Prior to the incorporation were you associated with a co-partnership known as the Boys Markets?

A. I was.

Q. And what was your capacity with it?

A. I was business manager.

Q. And how long had that continued?

A. Since—

Q. Let's put it this way: When did you first become associated with the Boys Markets whether as a co-partnership or as a corporation?

A. In October 1936. Wait a minute, October 1936.

Q. And that relationship, you have been associated with the enterprise from then up to the present time, is that [35] correct?

A. That is right.

Q. And are you and were you during the year 1953 an officer of the Boys Markets, Inc.?

A. Yes, I was.

Q. A corporation. And what office did you hold during the year 1953?

A. Secretary-treasurer.

Q. Were you a member of the Board of Directors during that year? A. I was.

Q. Incidentally, had you held that office and had you been a board director since the time the corporation started doing business?

A. Yes.

Q. That is to say on January 1st, 1946?

A. Yes.

Q. Now, incidentally what is the business of the Boys Markets?

A. Retail food markets.

(Testimony of Edward L. Eddy.)

Q. At the present time how many markets do they operate? A. Eight.

Q. During the year 1936, at which time you were associated with them—pardon me—you were also associated [36] with them in the year 1945, is that correct? A. I was.

Q. So you are familiar, are you not, with the lease secured by the co-partnership from the Torley Land Company which lease has been marked in evidence here as Exhibit 2-B? A. Yes, sir.

Q. You are also familiar, are you not, with the assignment of that lease to the corporation on January 1st, 1946? A. Yes, I was.

Q. Which assignment has been received in evidence and marked Exhibit 3-C, is that correct?

A. It's the one I gave you.

Q. Yes. Now at the time that the assignment was made from the partnership to the corporation had any building been erected by the co-partnership on that real property? A. I don't think so.

Q. It is a fact, is it not, that the building was erected in 1948?

A. Could I ask the date of that assignment?

Q. The date of the assignment is January 1st, 1946.

A. There was no building on the property at that time.

Q. Subsequently a building was erected by the corporation, is that correct?

A. That is right. [37]

Q. Do you recall what year that was erected?

(Testimony of Edward L. Eddy.)

A. Nineteen four—it was started in 1947 and completed in 1948.

Q. Right. Now with regard to the assignment of that lease from the partnership to the corporation to your knowledge was notification of such assignment given to the Torley Land Company?

A. Yes, I believe they signed it.

Q. Now, let me ask you, going back a moment, at that time who were the active—what persons were active in the management of the partnership business?

A. I didn't get the question.

Q. As of the date of the assignment, namely, January 1st of 1946, or just prior to that time, what individuals were active in the operation of the business?

A. In what capacities?

Q. Well I am going to ask you that. Who were they? Who was the—

A. Well, Joe Goldstein was the general partner. Edward Goldstein, Max Goldstein and Albert Goldstein were limited partners, and Joe Goldstein as trustee for Max Goldstein was a limited partner.

Q. What duties did each of those persons perform?

A. Well they were all active in the business in different capacities. [38]

Q. In what capacities? What did they do?

A. At that time Edward Goldstein was active in the produce department as soon as he was discharged from the Service, and I don't recall the exact date he came back.

Q. When you say "active," what do you mean? What were his duties?

(Testimony of Edward L. Eddy.)

A. As the supervisor of the produce departments.

Q. All right.

A. Max Goldstein was the buyer for the produce departments.

Q. You say "a buyer." Was there more than one buyer or was he the buyer?

A. I am not sure whether he had a buyer with him at that time or not.

Q. I see. All right.

A. Albert Goldstein was supervisor and buyer and overseer of all the groceries and liquor departments, and Max Goldstein was the produce buyer.

Q. Bernard?

A. Oh, Bernard Goldstein was the meat buyer and meat supervisor.

Q. And what were your duties?

A. Well, I was secretary and treasurer. I handled the finances and the physical properties of the company.

Q. What were Joe Goldstein's duties as general manager? [39]

A. Joe Goldstein was president and general executive head of the firm.

Q. All right.

Mr. Greaves: This is with respect to the partnership or the corporation?

Mr. Campbell: I am talking about the partnership period.

By Mr. Campbell:

Q. Did those same general duties—

A. This is prior to the corporation?

(Testimony of Edward L. Eddy.)

Q. Yes. Now did those same general duties carry forward into the corporation?

A. They were, yes.

The Court: Would you state for the record the relationship of these various members of the Goldsteins?

The Witness: They are all brothers excepting myself.

The Court: All that were mentioned are brothers?

The Witness: That is right.

By Mr. Campbell:

Q. Now do you recall, Mr. Eddy, in 1953—strike that—first let me ask you this: In 1953 where were the offices of the corporation?

A. What were the offices?

Q. Where were they? Where were they located? [40]

A. At 5531 Monte Vista Street, Los Angeles.

Q. And did each of the brothers whom you have mentioned have their offices there?

A. Yes, they did.

Q. Those were the general offices of the corporation?

A. They were the general offices.

Q. And as I understand it they were performing these same general duties on the day-to-day operation at that time that they had prior to the activation of the corporation, is that correct?

A. That is right.

Q. Now, what was the custom at that place of business during 1953 as to matters of policy and day-to-day operation; that is to say, were discussions had

(Testimony of Edward L. Eddy.)

among the individuals whom you have named and yourself?

A. Well, we are all very close there and in daily contact with each other.

Q. Were day-to-day problems discussed by all of you? A. Yes, they were.

Q. Was that true prior to the making of any decisions? A. Generally, yes.

Q. Now do you recall in 1953 that discussions were had among yourselves relative to the possible purchase of the fee; that is to say, the land underlying the building, the land subject to the lease for the Torley Land Company? [41]

Mr. Greaves: I object. I think many of counsel's questions are leading questions, your Honor.

Mr. Campbell: This is a preliminary question to ask if there were discussions.

The Court: Let's not worry too much about leading questions. I don't want you to be putting words into the witness' mouth.

Mr. Campbell: No, this is not a suggestive question.

Do you want the question read?

The Witness: Let's have the question over again.

Mr. Campbell: All right, will you read the question?

(The question was read.)

By Mr. Campbell:

Q. Do you recall the fact that discussions were had?

A. Yes, there were conversations about it, I remember.

(Testimony of Edward L. Eddy.)

Q. Now I am going to show you a book and I will show it to counsel, and ask you if this is the book containing the minutes of the Boys Markets, Incorporated?

A. That is the minute book.

Q. And was this minute book maintained by you as secretary of the corporation?

A. It was.

Q. Was it the usual course of business to maintain such a minute book?

A. Yes, regularly. [42]

Q. And were the minutes that appear therein entered on or within a short time after the events to which they relate? A. Within a—

Q. How soon would you write up the minutes of a particular meeting?

A. Oh, it might be anywhere from a week to a month or more.

Q. I see. But the minutes then would not—would be prepared in not more than a month or so after a discussion on a particular subject, is that correct?

A. That is right.

Mr. Campbell: I am not going to offer this record into evidence but I am going to refer to certain minutes and read into the record from it, if the Court please.

Do you wish to see these first?

Mr. Greaves: Yes, I would, please. Is counsel going to put this into respondent's hands?

Mr. Campbell: I will have it marked for identification so that I may withdraw it at the end of the case, but read into the record the portions that I believe

(Testimony of Edward L. Eddy.)

are pertinent. Respondent can then, if there are portions that he desires to read, do the same rather than encumber the record with a large thing.

Mr. Greaves: Would it be proper, your Honor, to [43] note at this time that these are not exact minutes. We don't know—we know the date of the meeting from the record, but not when the minutes were written; that they are apparently merely the best recollection of the person who made them whom I believe was Mr. Eddy.

Mr. Campbell: That is a matter for cross-examination.

The Court: Yes, that is a matter I believe to be brought up by the witness. Is there any objection to his reading the minutes into the record?

Mr. Greaves: Only with this limitation that I just stated, that these are not exact records in that they are not quotations of individuals at any board of directors' meeting, but are the best recollection.

Mr. Campbell: I know of no small company that maintains that type of minutes.

The Court: That is a matter that you can bring out from the witness on cross-examination. I am just inquiring as to whether or not you have any objection to having it done this way rather than over the portion of the minutes in the record itself.

Mr. Greaves: No objection.

The Court: All right.

Mr. Campbell: I wish at this time to read from the minutes, regular meeting of the board of directors, the Boys Markets, Inc., the 27th day of January, 1953, reading [44] from Page 2 of those minutes:

(Testimony of Edward L. Eddy.)

> "The president stated that it might be possible to purchase the land now under lease on which we built the San Gabriel market, and that the purchase of this land would enable us to procure a loan on the property and increase our working capital."

End of quotation.

By Mr. Campbell:

Q. Those minutes were written by you, Mr. Eddy?

A. Yes, they were.

Q. And they expressed the expression that had been made among yourself and the other directors?

A. Yes, they did.

Mr. Campbell: I will also read from the minutes of April 28th, 1953 of the board of directors, reading from Page 2 of those minutes.

The Court: Excuse me, Mr. Campbell. What was the date of the first meeting?

Mr. Campbell: Of the first?

The Court: Yes, that you read.

Mr. Campbell: The first I read was January 27, 1953.

The Court: Board of directors?

Mr. Campbell: Board of directors. The second one I am reading is from the board of directors on April 28, 1953. [45]

"At a previous meeting there was a discussion about the possibility of purchasing land on which the San Gabriel Market was located. It has now been decided that Joe Goldstein and Lillian Goldstein would buy this

(Testimony of Edward L. Eddy.)

land as their private property, and they may at some time in the future sell it to the Boys Markets."

By Mr. Campbell:

Q. Those minutes were also prepared by you?

A. Yes, they were.

Q. Now, Mr. Eddy, were you present during that period of time, namely, January, to which the first minutes refer, and thereafter up to April when the second minutes occurred, during which conferences and conversations were held between Joe Goldstein and his brothers relative to the acquisition or purchase either by Goldstein or by the corporation of this land in San Gabriel?

A. I don't remember any particular time it was discussed when we were all present, but I know there were discussions had about it because of the manner in which this title had to be acquired.

Q. I take it like most situations of that kind the brothers would be together, or one of them would be together or you would be with one or two of them, is that correct? A. That is right.

Q. So that did you during that period of time discuss [46] with each of them individually, whether all at once or separately, discuss it with each one of them?

A. I doubt if I did.

Q. With which one?

A. Probably was—well, I don't recall, I am sorry.

Q. You don't recall which ones?

A. I don't recall which ones I discussed it with. Most of my discussions along that line were with Albert Goldstein because he was in the office almost all the

(Testimony of Edward L. Eddy.)

time. The other boys were out a lot traveling around the stores and doing their buying. However, they did come into the office almost every day.

Q. And do you recall being present when any of them expressed any opinions concerning it during this period of time and prior to this meeting that you referred to?

A. Well I can say my general recollection that they all were in favor of arriving at some kind of a situation where we could borrow money on that market.

Q. Yes.

Mr. Greaves: I wonder if this could be made a little more specific an answer. "Some sort of a situation" needs a little clarifying.

By Mr. Campbell:

Q. What do you mean by that?

A. Well, when we built that market under the terms [47] of the lease the lessor was not required to subordinate his title to any loan we might make. We did have a long commitment from an insurance company at one time which was later rescinded and we never were able to get a loan on it. The entire cost of the building came out from our working capital, cash. And I would also have liked to have seen some kind of a situation where we could borrow money on it.

Q. I see. And general discussions were had on that situation?

A. Yes, they were.

Q. Now, subsequently were there specific conversations relative to the proposal or any proposals of the

(Testimony of Edward L. Eddy.)

Torley Land Company? Do you recall discussions as to that?

A. The first I heard that the Torley Land Company was willing to dispose of their title to the Boys Markets was prior to either one of those meetings.

Q. Yes.

A. And of course we were interested. I don't remember the figures now, but his figures were higher than we thought that we ought to pay for it. We thought that because of the low income he was getting from that lease, the valuation he asked for that property, it was out of proportion to the income he was getting which was tied up to and till the end of that fiscal year.

Q. I take it that those were —[48]

The Court: Just a moment.

Mr. Greaves: Who does the witness refer to as "we"?

The Witness: Will you ask me a little louder, please?

Mr. Greaves: When you stated in that last answer "we," who were you referring to by saying "we"?

The Witness: I was—the group of us.

Mr. Greaves: The board of directors?

The Witness: Generally, yes. It wouldn't be anybody outside of that group.

By Mr. Campbell:

Q. I take it that these are matters that occurred prior to there ever being the final offer which led to the acquisition by Joe and Lillian Goldstein, is that correct? A. That is right.

Q. Now, commencing in January of 1953 when did

(Testimony of Edward L. Eddy.)

you first hear the proposal to trade the fee for property in Las Vegas, Nevada?

A. Well, I would say that it was sometime between Christmas and a month later.

Q. Sometime between Christmas and the end of January of '53, is that correct?

A. That's right, Christmas of 1952.

Q. And did you have discussions among yourselves, [49] that is to say, among yourself with the other stockholders, namely, Joe Goldstein, Edward and Max and Bernard relative to this proposition of acquiring land in Las Vegas?

A. Well, I believe there was because the idea that we might be able to purchase it at a good price was brought into us by Joe Goldstein personally.

Q. Yes. And what was the reaction of these brothers?

A. At that time he was in touch with—Joe Goldstein I mean was in touch with Mr. Torley frequently, and we all presumed that he would proceed to arrive at some kind of a deal that we could get together on.

Q. Now I have referred you specifically to when the first proposition relative to the trade in Las Vegas—

A. That is right.

Q. When did that come up?

A. That is right. That was after January, as I remember it now. I am refreshing my memory from the minutes.

Q. All right. Now April 28th according to these minutes the board of directors said in effect that Joe and Lillian Goldstein go ahead and buy it as your own

(Testimony of Edward L. Eddy.)

property. Now what I am trying to get at is the discussion among yourselves, the other directors and stockholders as to why the corporation itself didn't want to buy the property or didn't buy the property?

A. Well I know they were not very anxious to get [50] involved in any deal in Las Vegas and I was particularly opposed to it because they were involved in a trade in another state, and I felt it was not consistent with a loan agreement we have on a long term loan with Provident Mutual Insurance Company.

Q. You are referring to your reasons. Did any of them express reasons as to why they did not want to be involved in a Las Vegas transaction?

Mr. Greaves: Objection. I believe the individuals who will be witnesses can answer that question better than this witness.

The Court: What was the question? Will you read it back?

(The question was read.)

The Court: I think he can answer that question yes or no. I will overrule the objection. The question is simply did they express any reason, not what the reasons were.

The Witness: Yes.

By Mr. Campbell:

Q. All right. Let me ask you this: As a result of your conversations with the other Goldsteins, that is the brothers other than Joe, did you determine that all of you were opposed to entering into this proposed trade transaction?

A. They would all prefer that Joe and Lillian buy

(Testimony of Edward L. Eddy.)

it and complete this trade situation and have that there as their [51] separate property. Another thing along that line with them owning it, they would be willing to subordinate the title to a mortgage loan on the building.

Q. I see. Were you—did you oppose as a director and officer the acquisition of the property in Las Vegas for the purpose of trading for the San Gabriel property?

A. I did.

Q. And for what reasons did you oppose it?

A. The reasons I just stated. I felt it was inconsistent with our note agreement.

Q. And you are referring to a note agreement existing at that time between the Boys Markets, a corporation, as borrower, and Provident Mutual Life Insurance Company of Philadelphia, as lender, is that correct? A. That's right.

Q. I take it from what you say that you were of the opinion such a transaction would be in violation of the terms of that agreement, is that correct?

A. I felt it could possibly be in violation. That is the first loan of that kind we ever had or that I ever had any experience with.

Mr. Greaves: Is this witness a lawyer that he is capable of answering such a question that you are drawing such a conclusion from him?

The Court: I think he can answer what his thinking [52] was. I think you are getting into rather leading questions, Mr. Campbell. I would prefer to have the witness state it himself.

Mr. Campbell: Yes, sir.

(Testimony of Edward L. Eddy.)

By Mr. Campbell:

Q. What was your thinking on the matter?

A. Well, I have to make a statement in order to clarify that.

Q. Well, if it was your thinking why you are entitled to make the statement.

A. I was very anxious that we keep in their good graces because I was thinking ahead to a time when we might want to increase that loan or get a new loan or at the termination get a new loan.

The Court: By "their," you mean—

The Witness: Provident Mutual, yes.

By Mr. Campbell:

Q. What was the amount of that loan?

A. It was $400,000.00.

Q. Yes. Now, go ahead. What was your thinking with regard to that loan as it affected the purchase of property in Las Vegas?

A. Well, in that note agreement there are certain negative covenants that we agreed to, and if you will let me read them I will tell you about it. [53]

Q. We are more concerned—

A. They are stated in there. I am going back several—

Q. We are more concerned with you rather than a legal interpretation of them, of what you thought. You stated that you opposed the purchase of the property in Las Vegas by the corporation so that we are concerned with what you thought.

A. By way of a trade, yes.

Q. That is right.

(Testimony of Edward L. Eddy.)

A. In another state. We also had another matter pending at that time where we didn't know whether we were in interstate commerce or not, a wages and hours matter.

Q. And those are matters that affected your thinking in opposing the acquisition of this property in Las Vegas?

A. That's right. I felt then and do now that our activities should be confined to California.

Q. Was it at that time or has it since been the policy of Boys Markets, Inc. to acquire real property generally, Mr. Eddy?

A. Only in recent years when we acquire land for the purpose of making a sale lease back deal on a long term basis.

Q. Do you own any land at the present time?

A. It is not our policy to own real estate. We own [54] land and building, our headquarters in Highland Park, have from the time that it was built.

Q. Is that the only real property?

A. The only way we could get a market in San Gabriel was to build it ourselves.

Q. You have subsequently sold this property, have you not? A. Yes, we have.

Q. On a sale and lease back?

A. Sale and lease back deal, 20 years lease.

Q. Now, Mr. Eddy, at the time that this transaction was entered into by Mr. Goldstein, you were fully advised of all of the circumstances, were you not? I mean, of the offer and the amount to be paid in connection with it? A. Yes, I was.

(Testimony of Edward L. Eddy.)

Q. And the cost to be put into the building in Las Vegas? A. Yes.

Q. And were these facts also disclosed by Mr. Goldstein to his brothers to your knowledge? Were those matters of open discussion at the office?

A. I can't say positively.

Q. You don't recall, I take it? A. No.

Q. All right. Now, subsequently and in December [55] 31st that property was purchased from Mr. Goldstein, was it not? A. Yes, that is right.

Q. The corporation bought it?

A. That is right.

Q. For what amount? Do you recall?

A. $75,000.00 for the land.

Q. And at that time a deed was executed, was it not, from Joe and Lillian Goldstein to the Boys Market conveying that property? A. That is right.

Q. I see.

Mr. Campbell: I see no purpose in putting the deed in, your Honor, because I think it's an agreed fact that the property was conveyed. Is that not correct?

Mr. Greaves: I have not seen the deed, Mr. Campbell.

Mr. Campbell: Of course your Revenue Agent's report shows that much.

Mr. Greaves: Well, I haven't seen it.

Mr. Campbell: Might I suggest a morning recess at this time?

The Court: Pardon?

Mr. Campbell: Might I suggest a morning recess?

(Testimony of Edward L. Eddy.)

The Court: Yes, all right, we will recess for [56] five minutes.

(Short recess taken.)

Mr. Campbell: Now, may we have that last question, please?

The Court: The last thing you said was you saw no reason for putting the deed into evidence.

Mr. Campbell: May we stipulate, Mr. Greaves, that the property in question was conveyed by a quit claim deed executed December 31, 1953, by Mr. Joe Goldstein and Lillian Goldstein, deeding the property referred to in San Gabriel to Boys Markets, Inc., a California corporation, which deed was recorded December 31st, 1953 in the official records of the County of Los Angeles on that date, to wit, December 31st, 1953, in Book 43506, Page 116 of said records. Will it be so stipulated?

Mr. Greaves: I will stipulate that the records so stated have a copy of that conveyance.

Mr. Campbell: I do not get your distinction.

Mr. Greaves: December 31st, 1953 from Joe Goldstein and Lillian Goldstein to the Boys Markets, Inc.

The Court: What is it now that you are willing to stipulate?

Mr. Greaves: That there is in the records of Los Angeles County—is that it, Mr. Campbell?

Mr. Campbell: Yes. [57]

Mr. Greaves: A conveyance of the subject San Gabriel property from Joe Goldstein and Lillian Goldstein to the Boys Markets, Inc.

Mr. Campbell: And attached thereto are—

(Testimony of Edward L. Eddy.)

The Court: Mr. Campbell, I think I would prefer to have these documents under discussion in evidence.

Mr. Campbell: Yes, I think so.

By Mr. Campbell:

Q. I show you a document, a grant deed, and ask you if that is the deed by which the Boys Markets, Inc. obtained title to the property from the Goldsteins located in San Gabriel?

A. That is correct. That's the deed.

The Court: You had better have that marked for identification, Mr. Campbell.

Mr. Campbell: I am going to offer it in evidence, if the Court please.

The Clerk: Petitioners' Exhibit No. 5 marked for identification.

(Petitioners' Exhibit No. 5 was marked for identification.)

Mr. Campbell: I call attention to the fact that there are affixed thereto $82.50 of excise stamps in connection with such transfer.

The Court: Do you have any objection to it? [58]

Mr. Greaves: No objection.

The Court: Petitioners' Exhibit No. 5 will be received in evidence.

(Petitioners' Exhibit No. 5 was received in evidence.)

Mr. Campbell: Your Honor, may that be marked Exhibit No. 7?

The Court: Have you already marked it?

The Clerk: Yes, your Honor, I have so marked it as Petitioners' Exhibit No. 5.

Mr. Campbell: Very well.

(Testimony of Edward L. Eddy.)

By Mr. Campbell:

Q. Now, Mr. Eddy, what were the circumstances under which the Boys Markets purchased that property on December 31st for what you have described to be $75,000.00 subsequent to its acquisition by Mr. Joe and Mrs. Lillian Goldstein?

A. To acquire title to the property, thinking of making a sale lease back deal, which never did occur, however.

Q. I occurred subsequently, however, did it not?

A. Yes, it did.

Q. Not at that time?

A. Well, sometime later.

Q. Were you attempting to achieve such a result [59] at that time or you had in mind achieving such a result at that time, is that correct?

A. That is right, yes.

Q. Will you state whether or not there was involved at that time the matter also of the loaning capacity of the corporation?

A. That is right. We could have borrowed on a long term loan.

Q. Now, in connection with the acquisition on December 31st, 1953 of that property for $75,000.00, did you personally make any investigation to determine whether or not that was a fair price to pay for the property? A. Yes, I did.

Q. And what conclusion did you come to?

A. That that was a fair market value.

Q. What type of investigation did you make? Was

(Testimony of Edward L. Eddy.)

that made before the purchase, before you bought it for $75,000.00? A. Yes, it was.

Q. All right. Now, what type of investigation did you make?

A. I made an inquiry at the Bank of America as to what we could borrow on that, and what would be a fair market value of the land, and I was informed by them that $75,000.00— [60]

Mr. Greaves: Objection, your Honor. We can't cross-examine the testimony this witness is about to give.

By Mr. Campbell:

Q. Just stop at that point. You made an inquiry of the Bank of America, is that correct?

A. That's right.

Q. Did you make other inquiries for that purpose?

A. No, I didn't.

Q. I see. However, I gather that you were satisfied then from your statement that that was a fair price, is that correct? A. I was satisfied.

Q. . Was it at any time your intent or was there ever at any time an expression of any of the other stockholders in your presence that the purchase of this transaction was to pay a dividend to Joe and Lillian Goldstein? A. No.

Q. Or that—was there ever any discussion that Joe and Lillian Goldstein in acquiring the property were acting simply as the agent or in behalf of the corporation?

A. You mean when they bought it?

Q. Yes. A. No. [61]

(Testimony of Edward L. Eddy.)

Q. Was there ever any intent on your part or discussion between yourself and any other of the stockholders or directors of the corporation that this was a means of paying some money over to Joe Goldstein or his wife?

A. No, not at—no. We knew there was a profit in it, of course.

Q. You knew the whole transaction, isn't that correct? A. Yes.

Q. But I gather there was no intent to prefer Joe Goldstein, to give any preference to Joe Goldstein, is that correct? A. That is right.

Mr. Campbell: You may cross-examine.

Mr. Greaves: May I have just a moment, if your Honor please?

The Court: Yes.

Cross-Examination

By Mr. Greaves:

Q. Mr. Eddy, I wonder if you can tell the Court the year in which the Goldstein family commenced in the market business, the business of dealing in markets?

A. Being partners?

Q. No, just when did they open their first store? When did Joe open his first store as an individual or as [62] a partner or however the Goldsteins started in the market business?

A. Well, it was around 1925 or '27, along in there somewhere.

Q. Was that Joe Goldstein who commenced?

A. Joe Goldstein commenced it.

(Testimony of Edward L. Eddy.)

Q. So you would say the first Boys Market was opened in 1925, '26, '27, in that general period? Late 1920's?

A. I know it was about there sometime because—well,—

Q. Do you know whether the first Boys Market was operated as a limited partnership or as a corporation or as a sole proprietorship?

Mr. Campbell: Objected to.

The Witness: Sole proprietorship.

Mr. Campbell: Objected to as immaterial, if the Court please.

Mr. Greaves: Attempting to get background, your Honor, control of this corporation.

The Court: All right, you may answer that.

The Reporter: There is an answer on the record.

Mr. Greaves: I didn't hear the answer.

(The record was read.)

By Mr. Greaves:

Q. Operated by Joe Goldstein? [63]

A. Yes.

Q. Do you know when the Boys Markets was incorporated, the year that a charter was acquired from the State and the incorporation took place?

A. 1936.

Q. Were you one of the organizers and incorporators? Were you one of the organizers and incorporators of that corporation, sir?

A. No, I was not, no.

Q. Do you know who were the organizers and incorporators?

(Testimony of Edward L. Eddy.)

A. Well, from the records it was Joe and his four brothers.

Q. By the records you speak of the charter?

A. Right.

Q. Do you know in what business form the Boys Markets operated between the years of incorporation, that is 1936, and the year 1946 when it—

A. I am sorry I didn't get the first—

Q. Pardon me. Strike it. Let me rephrase that.

In what form, business form, did the Boys Markets operate from the time it was—took out a corporate charter in 1936—and the time it became the Boys Markets, Inc. on January 1st, 1946?

A. It was a limited partnership in 1936. It was [64] the entire year.

Q. From 1936 to 1946 it was a limited partnership?

A. That's right.

Q. Fine, thank you.

Do you know when the Boys Markets commenced business as a partnership rather than a sole proprietorship?

A. January 1st. Wait a minute.

Q. You say Joe Goldstein operated the Boys Markets as a sole proprietorship?

A. From the time he first started until January 1st, 1936.

Q. Fine, thank you.

Now, you say that you were the business manager of the limited partnership?

A. I started in October, 1936.

Q. In what capacity?

(Testimony of Edward L. Eddy.)

A. I started as a bookkeeper.

Q. As a bookkeeper?

A. Right.

Q. How long were you the bookkeeper?

A. Oh,—

Mr. Campbell: Still are, aren't you?

The Witness: Probably a year.

By Mr. Greaves:

Q. A year [65] A. Yes.

Q. Then you became a general manager?

A. No, business manager.

Q. Business manager, pardon me.

As the bookkeeper of the limited partnership were you familiar with its capital structure, that is, the partnership interests of the respective partners?

A. Yes, I was.

Q. Do you know what percentage the partner Joe Goldstein was?

Mr. Campbell: Objected to as immaterial, if the Court please.

The Witness: I don't—

Mr. Campbell: Just a moment, that is objected to as immaterial.

The Witness: The percentage—

The Court: The percent of ownership Joe Goldstein had?

Mr. Campbell: Back in 1946.

The Court: Well, it seems to me it is going pretty far back. I think the Government is trying to develop something. I will overrule the objection. You can answer the question.

(Testimony of Edward L. Eddy.)

The Witness: Well, I don't remember their interest. [66]

By Mr. Greaves:

Q. That is fine, Mr. Eddy.

Do you recall who the partners were?

A. Yes. Joe Goldstein was the general partner, Edward, Max and Albert were limited partners, and Joe Goldstein was a limited partner as trustee for Max Goldstein.

Q. Do you know who the partners were on September 22nd, 1945?

A. They were the same. I might have to back up on that. I am not sure whether that trust had been eliminated or not at that time.

Mr. Greaves: May I see Exhibit B-2, please?

By Mr. Greaves:

Q. Now, I hand you Exhibit B-2 in this case, Mr. Eddy, and ask you if you can identify this for the record at this time.

A. That is the ground lease for the San Gabriel property.

Q. Executed between what parties?

A. Between the partnership and the Torley Land Company.

Q. I wonder if I could get you to read this first paragraph on the lease.

A. "This indenture of lease made this 27th day of September, 1945 by and between Torley Land Company, a [67] corporation, hereinafter designated as lessor, and the Boys Markets, a limited

(Testimony of Edward L. Eddy.)

partnership consisting of Joe Goldstein, as general partner, and Edward Goldstein and Joe Goldstein as trustees for Max Goldstein, limited partners."

Q. Thank you. Is your testimony at this time, Mr. Eddy, that all of the brothers were partners in this limited partnership and that this document is incorrect?

Mr. Campbell: Oh, just a minute. That is objected to as argumentative and calling for his conclusion.

The Court: Well,—

Mr. Campbell: If counsel wants to amend—

The Court: Let's ask him what his testimony—

Mr. Campbell: If counsel wants to amend the stipulation—

The Court: I see that it is stipulated that on September 22nd, 1945 Joe Goldstein was the sole general partner in the limited general partnership consisting of himself, as the general manager and the other two, Edward and Joe Goldstein as trustees, as limited partners. I suggest, Mr. Eddy, if you don't know, if you are not sure of an answer to a question, just say you don't know. But now you have testified that as of that date the partnership consisted of all five brothers. What is your testimony now? That's what he is trying to get at. [68]

The Witness: Well, at sometime, and I don't recall the dates, Albert Goldstein and Bernard Goldstein were eliminated as to any capital interest in the business. I don't remember what date that occurred.

The Court: Has he answered your question, Mr. Greaves?

(Testimony of Edward L. Eddy.)

Mr. Greaves: I think I have gotten as satisfactory an answer as I can get at this time, your Honor. Thank you.

Mr. Campbell: I might state, your Honor, if the Revenue Agent took the position that that was a partnership at that time, and that is set forth in the stipulation, if counsel has facts that the others were actually partners at the time of the execution of that lease, I have no objection to amending the stipulation, but so far as I know the stipulation speaks the truth.

Mr. Greaves: Your Honor, at this time I should like the record to show that every document executed by the Boys Markets, a limited partnership, states that the partners in this corporation were Joe Goldstein as general partner, Edward Goldstein as limited partner Joe Goldstein as limited partner, trustee for Max Goldstein. I am trying to ascertain the facts.

The Court: It is a matter of evidence, Mr. Greaves. You can't simply make a statement for the record [69] without proving it in some way.

Mr. Greaves: These are documents in evidence, your Honor.

The Court: Well, then, they will speak for themselves.

Mr. Greaves: Yes, I am just noting this.

The Court: You didn't limit yourself to documents in evidence.

Mr. Greaves: I am sorry.

The Court: You said "every document."

Mr. Greaves: Would you so correct the record, please?

(Testimony of Edward L. Eddy.)

By Mr. Greaves:

Q. Mr. Eddy, do you know where the funds and assets that made up the limited partnership came from?

A. The assets that came from the limited partnership?

Mr. Campbell: It is obvious he misunderstands the question.

Mr. Greaves: I am repeating it for him.

By Mr. Greaves:

Q. Do you know who contributed the assets?

A. The original—

Q. Of the corporation?

A. The original limited partnership in 1936, the [70] capital was contributed by the individuals, all of them.

Q. By all of them you mean each and every one of these brothers? A. Right.

Q. Did you contribute any?

A. Pardon?

Q. Did you contribute any of the assets of the limited partnership?

A. No, I didn't.

Q. Were you paid a salary as an employee of the limited partnership? A. I was.

Q. Were you familiar with the management of the limited partnership? A. Yes, I was.

Q. In your opinion and based on your familiarity with the management of the limited partnership, would you state that Joe Goldstein had a more important role in the management of that limited partnership than the other partners?

(Testimony of Edward L. Eddy.)

Mr. Campbell: Objected to as immaterial, incompetent, if the Court please. If he was a general partner under any view that counsel takes here.

The Court: Well, if you are speaking of his activities in the partnership, I think if you know the [71] answer you can ask the question. I will overrule the objection.

The Witness: Well, he was the chief executive of the partnership and later became chief executive of the corporation, but each one of these fellows, including myself, had responsibilities and could act on our own initiative.

By Mr. Greaves:

Q. Who determined that the Boys Markets would lease the property in San Gabriel from the Torley Land Company?

A. Who determined that we would lease it?

Q. That is correct.

A. Well, that was discussed by all of us and we looked at the market site and considered it as a possible location for a market. We were all out there and looked at it. We analyzed the territory.

Q. Who initially had the idea?

A. Pardon?

Q. From whom did the idea spring that it would be a good property to lease or a bad property?

Mr. Campbell: I think this is all immaterial, if the Court please.

The Court: Well, I do not see very much materiality in it, either. Somebody has to initiate it, but nevertheless— [72]

(Testimony of Edward L. Eddy.)

Mr. Greaves: I am trying to show, your Honor, that the petitioner Joe Goldstein in fact was a director of the destinies—

The Court: I will overrule the objection. Go ahead and answer the question if you know.

The Witness: I didn't get your question, I am sorry. I am a little hard of hearing. I want you to take that into consideration.

By Mr. Greaves:

Q. I appreciate that. I will try to speak a little bit louder.

Do you remember the conversation that was had with respect to the possibility of leasing the San Gabriel property among all of the members of the partnership?

A. Well, I don't remember the specific—

Q. Well, generally.

A. We all decided that it was a good market location.

Q. Do you recall who brought the subject up?

A. Who brought it up?

Q. Yes.

A. Well, I believe I did. I negotiated that lease and conducted all the negotiations.

Q. You represented the Boys Markets in negotiating? A. Yes, I did. [73]

Q. With the Torley Land Company on the lease?

A. Yes, I did.

Q. Well, then, these negotiations that you conducted with the Torley Land Company—strike that—

Who determined that the Boys Markets would cease

(Testimony of Edward L. Eddy.)

business as a limited partnership and commence business as a corporation?

A. I don't know, I don't remember.

Q. Who determined that the assets of the limited partnership would be exchanged for stock in the corporation?

A. Well, that was my recommendation.

Q. Did you check that recommendation with anyone or did you put it into effect by yourself?

Mr. Campbell: Now, I object to that, if the Court please. In the first place it is impossible. He couldn't—

The Court: It is impossible to put it into effect. He didn't own the assets or did he get the stock.

By Mr. Greaves:

Q. Did you state your recommendation to anyone in the limited partnership?

A. Yes, with all of them.

Q. To all of them. Did you have any voice in discontinuing the business of the limited partnership as a limited partnership? [74]

A. No, not as a limited partnership.

Q. Why did you recommend that it become a corporation?

A. Well, I thought—

Mr. Campbell: I object, if the Court please. I can see no relevancy in this line of examination to the problem which we have before us.

Mr. Greaves: I will strike that question then, your Honor.

By Mr. Greaves:

Q. When did you become a stockholder in the corporation?

(Testimony of Edward L. Eddy.)

A. Some years after it was organized, I don't remember.

Q. Not on January 1st, 1946? A. No.

Q. Do you know the authorized stock of the corporation, capital stock of the corporation?

A. The authorized capital stock?

Q. That is correct, sir.

A. I think it was originally $500,000.00.

Q. How many shares?

A. At $100.00 that would be 5,000 shares, wouldn't it?

Q. You don't know the answer to that question?

Mr. Campbell: These are all matters of record. [75]

By Mr. Greaves:

Q. When did you acquire your stock in the corporation?

Mr. Campbell: Objected to as immaterial.

The Witness: I don't remember.

The Court: Overruled.

By Mr. Greaves:

Q. From whom did you acquire the stock?

A.. From one of the brothers.

Q. How did you acquire the stock, from which brother? How did you acquire this stock purchase, a gift? A. A gift from Max Goldstein.

Q. And what did you say the year was?

A. I didn't say. I don't know. I don't remember.

Q. Are you married? A. Yes, I am.

Q. Does your wife own any stock in this corporation?

Mr. Campbell: Just a minute. I object to that.

(Testimony of Edward L. Eddy.)

We have a stipulation here as to the stock ownership, if the Court please.

The Court: Isn't that correct, Mr. Greaves?

Mr. Campbell: If counsel wants to change it—

Mr. Greaves: I am sorry, Mr. Campbell.

By Mr. Greaves:

Q. You are presently the vice president, a vice president in the Boys Markets? [76]

A. And treasurer.

Q. And treasurer? A. Right.

Q. In 1953 in what capacity did you serve the Boys Markets? A. Secretary and treasurer.

Q. Were you a stockholder in 1953?

A. I don't remember.

Mr. Campbell: We have stipulated that he was. It's in the stipulation.

Mr. Greaves: I am trying to pin him down to see if he remembers the general period of time.

Mr. Campbell: I object to trying to impeach the witness. These things have already been stipulated to, if the Court please.

The Court: Yes. I do not think you should try to confuse the witness on facts that you have stipulated.

By Mr. Greaves:

Q. It was also stipulated that you were a member of the board of directors. A. That's right.

Q. And what is your title on the board of directors?

A. What?

Q. Title of your position on the board of directors.

A. I am just a director. [77]

Q. When did you become a director?

(Testimony of Edward L. Eddy.)

A. When the corporation was organized, took over the business of the Boys Markets.

Q. How did you become a director or were you appointed or elected?

Mr. Campbell: Objected to as immaterial, if the Court please.

The Court: Well, you are asking questions that seem to me just encumber the record. It is obvious that he has to be elected, I suppose. I will overrule the objection.

Go ahead and answer. How did you become a member of the board of directors?

The Witness: I was elected.

By Mr. Greaves:

Q. What was Joe Goldstein's title on the board of directors? A. Chairman.

Q. What is Lillian Goldstein's title on the board of directors? A. She is a director.

Q. Did the Boys Markets have a stock bonus plan in 1953?

Mr. Campbell: Objected to as immaterial, if the Court please. I can see no materiality of a stock bonus plan to this controversy. [78]

The Court: Do you plan to tie that in in some way, Mr. Greaves?

Mr. Greaves: I had an alternative question, your Honor, that I read by mistake. I would agree that it should be stricken.

The Court: One thing I would like to correct is the statement I made that obviously you must have been elected.

(Testimony of Edward L. Eddy.)

Were you elected by the stockholders or were you elected by the directors to fill a vacancy?

The Witness: No, by the stockholders at the outset of the taking over the Boys Market business by the corporation.

The Court: All right.

By Mr. Greaves:

Q. Do you know whether Albert Goldstein ever owned stock in Boys Markets, Inc.?

A. He never did.

Q. To your knowledge as a director and now stockholder of this corporation, did it declare a dividend in 1953?

Mr. Campbell: Objected to as immaterial.

The Court: Overruled. You may answer.

The Witness: I will have to ask for the question again. [79]

By Mr. Greaves:

Q. Did the Boys Markets, Inc. declare a dividend to its shareholders in 1953? A. No.

Q. Did the Boys Markets operate at a profit in 1953? A. Yes.

Q. Has the Boys Markets ever declared a dividend?

Mr. Campbell: Objected to as immaterial.

The Court: Overruled. If you know the answer, you may answer.

The Witness: Yes.

By Mr. Greaves:

Q. Do you know what year? A. No.

Q. Now, with respect to these minutes of the Boys

(Testimony of Edward L. Eddy.)

Markets which petitioners' counsel read into the record of this case that you kept for the purpose—

A. I kept them, yes.

Q. You did keep them? A. Yes.

Q. With respect to the minutes covering the meeting of January 27, 1953—

A. Did I what?

Q. I am just trying to put you in the frame of [80] reference of the question I am going to ask. I am going to ask you a question with respect to the meeting of January 27, 1953. Do you know when you made or recorded those minutes?

A. The minutes?

Q. Yes.

A. I don't know the exact date. It was after the meeting.

Q. Were those exact minutes of the proceedings or were they your best recollection?

A. No, they were made from notes I accumulate in my file.

Q. Do you recall any reason given in the meeting of January 27, 1953 for providing that Joe Goldstein could sell the San Gabriel property to the Boys Markets, Inc. at any time?

Mr. Campbell: Just a moment. That's objected to as misleading and misstating the record.

Mr. Greaves: May I have a copy of that meeting?

Mr. Campbell: The meeting that he is referring to, he is quoting from the minutes of April 28th rather than from the minutes of January 23rd.

Mr. Greaves: May I leave it there, please?

(Testimony of Edward L. Eddy.)

Mr. Campbell: Certainly. I will make my objections upon that ground, your Honor. [81]

The Court: You will reframe your question, please.

Mr. Greaves: Yes, sir. I am just trying to find it in here.

The Court: If you want to ask questions about the other date it would be perfectly all right, but I would like to have you check it to make sure you are referring to the right one.

Mr. Greaves: I was looking for it.

By Mr. Greaves:

Q. Would you like to see this, Mr. Eddy, as I am referring to it? I am sorry.

A. I might answer the question better.

Q. Right. I now refer, Mr. Eddy, to the minutes of the regular meeting of the board of directors of the Boys Markets, Inc. held on April 28, 1953.

A. Yes.

Q. And I will now direct a question to the provision in those meetings on Page 2 thereof to this statement, "It has now been decided that Joe Goldstein and Lillian Goldstein would buy this land as their private property, and they may at sometime in the future sell it to the Boys Markets."

A. I recall that. Is that what your question was?

Q. Yes, sir, I am asking you now if you recall why [82] it was so provided that they could sell this land at some time in the future to the Boys Markets?

A. There was a trade involved on the property whereby the title could be acquired by somebody building an apartment in Las Vegas as and after that was

(Testimony of Edward L. Eddy.)

all completed and Joe and Lillian had title we could buy the property then without the complication of that trade and construction in another state.

Q. Was it your understanding at the time of that meeting that they would sell this property to the corporation?

Mr. Campbell: Now, objected to. That's a conclusion on his part. He can state what was said, but his understanding is—he can express what they said they would do or what they were willing to do.

The Court: I think he can testify as to what his understanding was of what they were going to do. I will overrule the objection.

The Witness: Now the question, please?

Mr. Greaves: Would you read that question, please?

(The question was read.)

The Witness: Not necessarily. They might. I don't know that there was any agreement that they would sell it, either verbal or written, and there was no written agreement.

By Mr. Greaves: [83]

Q. Mr. Eddy, was there or was there not a written agreement?

A. That they would sell it? No.

Mr. Campbell: He said there was no written agreement.

The Court: Please do not make objections. I think he is entitled to cross-examine this witness and check on statements that he made before.

Mr. Campbell: Very well.

By Mr. Greaves: You state I believe on direct ex-

(Testimony of Edward L. Eddy.)

amination that you first learned of the possibility of a trade for the San Gabriel—strike that—let me start again.

I believe, Mr. Eddy, on direct examination you testified that you first learned of the possibility of a trade between the Boys Markets and Torley Land Company whereby the Boys Markets—whereby someone would get the San Gabriel property in exchange for property in Las Vegas. Do you recall that testimony or that transaction or both? A. Yes.

Q. And you also testified I believe that you heard about this trade sometime around Christmas of 1952. I am just trying to refresh your memory at this time on your testimony.

A. I am not sure that the trade was known about [84] around Christmas.

Q. In any event, Mr. Eddy,—

A. We knew that the property was available. The reason I know that date is because the Santa Anita races started the day after Christmas.

Q. I am not curious about the date, Mr. Eddy. I want to know who told you that this land was available.

A. Joe Goldstein.

Q. You stated on direct examination that it is not the policy of the Boys Markets to acquire real property, land? A. That is right.

Q. Except for an occasional transaction where they acquire property for sale and lease back?

A. That became a policy later to acquire land for that purpose.

Q. Now, with respect to this land, the Boys Mar-

(Testimony of Edward L. Eddy.)

kets, Inc. allegedly purchased or purchased on December 31st, 1953— A. Yes.

Q. —did you testify that this land was subsequently sold and then leased back?

A. That was our thinking, that we would enter into a sales lease back deal for that property after acquiring the title. [85]

Q. You did acquire title? A. We did.

Q. You did sell the land?

A. Yes, we did. We sold it to—

Q. To whom did you sell this property?

A. We sold it to two brothers and one wife. Their names are Slavick. I don't recall their first names.

Q. Are they any relation to the petitioners in this case? A. Any relation to whom?

Q. Mr. and Mrs. Goldstein, Joe Goldstein.

A. No, they are not, no.

Q. Do you remember when this land was sold to the Slavicks? A. I believe it was in 1959.

Q. Can you be more specific?

The Court: You mean as to the actual—

By Mr. Greaves:

Q. As to the actual date.

A. As to an actual date, I believe it was in the summer of 1959.

Q. Fine. Thank you.

Now, you also stated on direct examination, that it was your opinion that the San Gabriel property was worth $75,000.00? [86]

A. That is right.

Q. Did you check with anyone else other than the Bank of America? A. No.

(Testimony of Edward L. Eddy.)

Q. And you based—what did you base your estimation on?

A. They told me that their idea of a fair market value was $75,000.00.

Mr. Greaves: I would like that stricken. I just wanted to know what you base—

Mr. Campbell: I object.

The Court: You asked the question.

Mr. Campbell: I ask that it not be stricken. It is an answer to the question.

By Mr. Greaves:

Q. All right. They told you that it was worth $75,000.00? A. Yes.

Q. Why did they? For what purpose did they tell you this?

A. I was just suggesting the possibility of a loan with them.

Q. For the purchase of this land?

A. If we owned the land and the building of borrowing money on it. [87]

Q. And this is the sole basis of your estimation of the value of this property, is that correct?

A. That is right.

Q. Now, at the meetings of the board of directors of January 27, 1953 and April 1953—I am looking for the date—April 28, 1953, were Joe Goldstein and Lillian Goldstein in attendance?

A. We do not have formal board meetings with all members present. We meet many times all of us together during the quarters between these board meetings where various matters we are considering are dis-

(Testimony of Edward L. Eddy.)

cussed. Many times they are not all there, but then the same matters are discussed with others when they are there.

Q. Do you have meetings—does the Boys Markets, Inc. board of directors have meetings in which records are not kept, and which minutes are not made?

A. These minutes are based on notes of various meetings we have throughout the quarter.

Q. I do not believe you understood my question, Mr. Eddy.

A. Formalized in the form of the minutes on the date of the meeting.

Q. Does the board of directors meet at any time—strike that, and let me start this one again.

Are there any meetings of the board of directors [88] in which minutes are not made?

A. Not of a meeting of the board of directors?

Q. So when you have these informal meetings you conduct no business?

A. We conduct business, but they are not formal board meetings. We are in there all together every day.

Q. Do you keep minutes of these informal meetings?

A. I keep notes.

Q. Do you record them as minutes of the corporation? A. No.

Q. Of the board of directors?

A. I make up my minutes from notes I have kept of what has transpired.

Q. Did Joe and Lillian Goldstein attend the board of directors meetings in which it was determined that they could purchase this property for themselves?

(Testimony of Edward L. Eddy.)

A. I don't recall, I don't know. I don't remember that.

Q. At the time the board of directors determined that it would purchase this property from the Goldsteins, was there an appraisal made for the corporation of this property? A. No.

Q. In 1953 or subsequently did the Boys Markets own other property on which its stores are erected? [89]

A. In 1957 we acquired the land—

Q. Just yes or no is fine, if you please. Did they purchase any of this property from Joe and Lillian or both Joe and Lillian Goldstein? A. No.

Q. Did they purchase this property from any other members of the board of directors? A. No.

Q. Any stockholders? A. No.

Q. Any officers of the corporation?

A. No.

Q. So all of these, so any such properties other than this San Gabriel property that Boys Markets, Inc. has owned were purchased from third parties, not members of the corporation?

A. Right. Let me hear that question again, if you please. I want to be sure I answered that right.

The Court: Just read it back.

Mr. Greaves: I think I can make it simpler, your Honor.

The Court: All right.

Mr. Campbell: Your Honor told me not to interrupt, but may I correct something? If he misunderstood a question, which I think he obviously has, he should go

(Testimony of Edward L. Eddy.)

[90] back to the question so the record shows he clears that question. I will not interrupt again.

The Court: I did not want you not to interrupt on a proper prior objection. I just didn't want to have a lot of objections as to form. I would like to get the facts out here in the time that we have. Certainly you make any objection any time you want to.

Mr. Campbell: Very well.

Mr. Greaves: Would you restate or reread the question to the witness, please?

(The question was read.)

The Witness: Any property?

By Mr. Greaves:

Q. Any property on which Boys Markets' stores—or other real property—

A. Not on which the stores are located, no.

Q. Other property owned by the corporation, other real property, land owned by the corporation?

A. Yes.

Q. Yes, the Boys Markets have purchased other land from its— A. Yes.

Q. From whom?

A. From Joe and Lillian Goldstein.

Q. From anyone else? [91]

A. Pardon?

Q. From any other members of the board of directors?

A. No.

Q. When did they purchase other land? When did the Boys Markets purchase this other land?

(Testimony of Edward L. Eddy.)

Mr. Campbell: I must object on the ground of materiality, if the Court please.

The Court: Well, I think he might be tying this into their theory. I will receive it at this time, and if it turns out that it can't be tied in any way or isn't tied in I will ignore it.

The Witness: It was a later date than this transaction here.

By Mr. Greaves:

Q. The following year?

A. I don't remember the year or the date.

Q. Was there more than one such purchase by the Boys Markets from Joe and Lillian Goldstein?

A. No.

Q. Just one? A. Yes.

Q. Do you recall anything about that transaction?

A. Well, it was a property that they owned. We bought it to add to our parking lot. [92]

Q. Do you know how long they had owned it?

A. Pardon?

Q. Do you know how long Joe and Lillian Goldstein had owned it prior to selling to to the Boys Markets, Incorporated?

A. No, I don't. I don't remember.

Q. But it was after the date of the San Gabriel property's purchase, this transaction?

A. It was after the date.

Q. Fine, thank you.

I now refer to Exhibit, Joint Exhibit No. 2-B, the lease between the Torley Land Company and the Boys Markets, the limited partnership, and have a special

(Testimony of Edward L. Eddy.)

reference therein to Paragraph 5 on Page 7 which provides in part—if counsel will not object to my paraphrasing—that the lessee—

Mr. Campbell: Pardon me. What page is that?

Mr. Greaves: Page 7, Paragraph 5. I have it on this copy. It provides that the lessee will have completed a building on this property and have it ready for occupancy on or before the 1st day of November, 1946.

By Mr. Greaves:

Q. Are you familiar with that provision in this lease, Mr. Eddy?

A. Well, I was at the time. I had forgotten it. [93]

Q. Well, is your memory—would you like to read it?

A. Well, it's there. We must have had an extension on it because we didn't build until—

Q. Did you have an extension on it? Do you recall whether you had?

A. I don't recall, no.

Q. Do you recall not having had an extension?

A. No, I don't.

Q. You have no memory of this?

A. I would assume that we had an extension because of this limitation.

Q. But you do not have any memory as to whether or not there was an extension, is that correct, sir?

A. No, I have forgotten that altogether.

Q. All right, fine.

Mr. Greaves: I believe, your Honor, that concludes cross-examination.

(Testimony of Edward L. Eddy.)

The Court: Any redirect?

Mr. Campbell: No. May this witness be excused, your Honor? He has a funeral to attend.

The Witness: No, it is too late now. It was at 11:00 o'clock.

Mr. Greaves: I apologize, Mr. Eddy, that we had to keep you so long. [94]

The Court: Mr. Eddy, just one question I wanted to clear up.

You were asked about whether Mr. Goldstein was present at the time, at the meeting of April 28th when it is reported in the minutes that it has now been decided that Joe and Lillian Goldstein would buy this land and so on. You stated you didn't know whether they were present at the meeting or not. Now, your minutes reflect that both of them were present. In drafting these minutes did you simply, did you record who was actually present at a meeting or did you just record that all directors were present?

The Witness: I just said, your Honor, that we didn't have any formal meetings. They each were accumulation of meetings and partial meetings that ensued, that occurred during each quarter.

The Court: Were the minutes ever submitted to the other members of the board for approval?

The Witness: Yes, they were. We used to write them up in book form and submit them, but they all got a copy of them.

The Court: All right. That's all. You may be excused. May the witness be excused?

(Testimony of Edward L. Eddy.)

Mr. Greaves: He may be excused, your Honor, as far as respondent is concerned. [95]

The Witness: Through for the day?

The Court: Yes.

Mr. Campbell: You had better leave the courtroom in the event we need to call you back in rebuttal later so that we don't—

The Court: Yes, it would probably be better for you not to stay in the courtroom.

Mr. Campbell: So don't stay in the courtroom.

The Court: That would disqualify you from any other testimony.

The Witness: I didn't intend to.

Mr. Campbell: Good.

(Witness excused.)

Mr. Campbell: Mr. Hall, please.

Mr. Greaves: If the Court please, this might be a convenient time to break because there will be some—I don't know how extensive the direct will be but there will be—

The Court: Well, I would like to head on as fast as we can. Let's start out with the witness.

Mr. Greaves: Surely. [96]

Whereupon,

HAROLD MONROE HALL,

called as a witness for and on behalf of the Petitoners, having been first duly sworn, was examined and testified as follows:

The Clerk: Would you state your name and address, please?

The Witness: My name is Harold Monroe Hall. I

(Testimony of Harold Monroe Hall.)

live at 7373 Pyramid Place, Los Angeles 46, California.

The Clerk: Thank you.

Direct Examination

By Mr. Campbell:

Q. Mr. Hall, what is your business or occupation?

A. I am an appraiser and I am employed by the Marshall & Stevene Appraisal Engineers.

Q. How long have you been an appraiser?

A. Only been an active appraiser since 1947.

Mr. Greaves: I am sorry, I didn't hear that answer.

The Witness: Since 1947.

Mr. Greaves: You have been what?

The Witness: An active appraiser since 1947.

Mr. Greaves: I see.

The Witness: In other words, I have devoted practically all of those years to appraising. [97]

By Mr. Campbell:

Q. Now, going back a bit, what was your occupation prior to devoting all of your time to appraising?

A. I was an engineer with the County of Los Angeles from 1928 until 1957 when I retired.

Q. But I gather the latter portion of that employment was as an evaluation engineer, is that correct?

A. The last ten years. The last ten years of that was as evaluation engineer.

Q. Now in addition to your work with the County, have you had any specialized schooling in appraisal work?

A. Yes. I have taken courses at U.S.C. I took a

(Testimony of Harold Monroe Hall.)

course in property evaluation—the teacher there was Larry Sando—in 1948. Real estate appraisal course by Mr. Sando in 1951. Advanced real estate appraiser by Henry Babcock in 1952. At U.C.L.A. a course in geology which is indirectly connected with appraisal work in 1937. Investments in 1941, construction cost estimating in 1949.

Q. In connection with your work for the County of Los Angeles, the appraisal work, what was the nature of the appraisal work which you did for them?

A. My work with the County was completely in condemnation appraisal.

Q. So that it involved the appraisal of the fee or other interests in real property? [98]

A. Yes, sir.

Q. And real property of every type and nature, is that correct? A. Yes, sir.

Q. During the course of that activity for the County of Los Angeles and your subsequent activity since retiring from the service, have you heretofore appeared and been qualified as an expert appraiser in various courts? A. Yes, I have.

Q. Roughly on how many occasions during your career have you been qualified as an appraiser and permitted by the court to give testimony as an expert on the appraisal of real property?

A. I have actually appeared on nine occasions in trials of some duration, and I have appeared as an expert witness on property evaluations in many cases, possibly 20 or 25 default cases.

(Testimony of Harold Monroe Hall.)

Q. Yes. What professional associations are you a member of in connection with appraisal?

A. I am a member of the American Society of Appraisers. I was the vice president of the American Society of Appraisers in the Los Angeles Chapter the year of 1957 and '58. I am a member of the American Right-of-Way Association, and I am also on the panel of Fee Appraisers for the Federal Housing Authority. [99]

Q. In that connection have you been engaged, since retiring from your public service with the County of Los Angeles, have you been engaged by the Federal Housing Authority to make appraisals?

A. Yes, sir.

Q. And now you state you are presently employed or associated with the firm of Marshall & Stevens, appraisal engineers. Is that correct?

A. Yes, that's correct.

Q. That is a national concern, as I understand?

A. Yes, it is.

Q. With offices in various cities?

A. Yes.

Q. Now, in connection with your work for Marshall & Stevens were you assigned the job of making an appraisal of property at the corner of Del Mar and San Gabriel Boulevards in the City of San Gabriel which property is presently occupied by a market known as the Boys Market?

A. That is correct, with one exception, sir. It is at Valley Boulevard in San Gabriel.

Q. Did I misstate the location?

(Testimony of Harold Monroe Hall.)

A. Yes, sir.

Q. At Valley Boulevard and Del Mar?

A. At Del Mar.

The Court: Yes. [100]

Mr. Greaves: The respondent has no objection to the qualifications of this individual, your Honor. I would like the record to so show.

Mr. Campbell: I wasn't going further. Thank you.

Mr. Greaves: Yes, sir.

By Mr. Campbell:

Q. During what period of time were you on that assignment?

A. I was assigned this job on the 11th day of January.

Q. Yes. And you just completed it, is that correct?

A. I have just completed it.

Q. Actually originally Mr. Vaughan of that concern was to testify here, isn't that correct?

A. I believe so. However, he is in the East.

Q. He is presently engaged in a trial, is he not?

A. Yes.

Q. Yes, all right. But the testimony you are about to give is based upon your personal examination, is that correct?

A. Completely, sir, yes.

Q. All right. As a matter of fact, Mr. Hall, you were familiar with that area for a number of years back, [101] were you not?

A. I was. I have been for some time. In approximately 1952 and 1953 I worked on the opening

(Testimony of Harold Monroe Hall.)

and widening of Del Mar and Garvey Boulevard southerly—it slips my mind—to Protero Grande Road.

Q. Yes. Involved was the enlargement and improvement of Del Mar, one of the streets that forms the intersection where the property we are interested in is located, is that correct?

A. Yes.

The Court: Was that in connection with acquiring right-of-ways?

The Witness: Yes, and the appraisal of those right-of-ways.

By Mr. Campbell:

Q. Mr. Hall, will you state where that property is located? That is to say, the nature of the two boulevards at that intersection which form that intersection?

A. The major boulevards that form the intersection of the property in question were Del Mar Avenue and Valley Boulevard.

Q. Now, what is Valley Boulevard?

A. Pardon me?

Q. Will you describe Valley Boulevard, that is to say, where it originates and where it goes, if you know? [102]

A. Well, Valley Boulevard is a very well traveled and very well known highway right-of-way passing through Alhambra, the City of San Gabriel, and easterly. The main intersections about that point are New Avenue to the west, then Delaware Avenue, and to the east San Gabriel Boulevard, and that constitutes the City of San Gabriel.

(Testimony of Harold Monroe Hall.)

Q. Now, based upon your observations, Valley Boulevard is one of the main east and west arteries through the San Gabriel Valley?

A. It is one of the main east-west arteries, and most important one.

Q. Most important one? When you say "most important," do you refer to a commercial standpoint?

A. From a commercial standpoint.

Q. Yes. I presume the freeway takes far more traffic, but—

A. Well, I mean it is a most important, not the most important. It is a very important through boulevard.

Q. What is the course of Del Mar Avenue?

A. Del Mar Avenue north of Valley Boulevard is more of a residential street. At Valley Boulevard it becomes a very important artery to the San Bernardino Freeway and southerly to Protero Grande, a distance of possibly four or five miles.

Q. Yes. Now, Mr. Hall, in the course of your [103] preliminary work for the purpose of determining value of that parcel of property, you were provided, were you not, and examined a policy of title insurance?

A. Yes, sir.

Mr. Campbell: A copy of which, your Honor, is attached to the petition herein and is referred to in the stipulation here. It is Exhibit B to the petition.

At this time in order to assist the Court I have here if I can lay my hand on it the original of that title policy. It is the original and for the assistance of the Court subsequently in examining the exhibits I will of-

(Testimony of Harold Monroe Hall.)

fer the original to be marked as an exhibit. Is that satisfactory, Mr. Greaves?

Mr. Greaves: Yes.

By Mr. Campbell:

Q. You examined that policy, did you not?

A. Yes, sir.

Q. And were you also provided with a copy of the lease, a lease dated the 27th day of September, 1945, between the Torley Land Company and the Boys Markets, a co-partnership? A. Yes, sir.

Q. Which said lease has heretofore been received in evidence as Exhibit 2-B?

A. Yes, sir, I received that. [104]

Q. And you examined that document as well?

A. Yes.

Q. Now in the course of your investigation did you make physical examination of the property?

A. I did.

Q. And did you make physical examination of the surrounding property? A. I did.

Q. Did you entertain—directing your attention specifically to the month of December, 1953—as to the matter of sale of either similar or nearby property at that time? A. Yes, sir.

Q. I think you said that you were generally familiar with this property in 1953 or with the area, is that correct? A. That's true.

Q. And what other type of investigation did you make?

A. I investigated the records of the County Assessor to determine the sales that were made at or about

(Testimony of Harold Monroe Hall.)

that time. In fact, I looked the records through from 1942 up until sometime after 1953.

Q. Yes.

A. In order to determine where those sales were, what the sales were, and tried to determine sales price [105] at which those properties changed hands.

Q. Yes. And you were given as your assignment, were you not, to determine or to arrive at an opinion based upon proper appraisal procedures of the fair market value of that property as of December 31st, 1953?

A. Yes, sir.

Q. And did you form an opinion on that subject?

A. I did form an opinion on that subject.

Q. And what amount did you find to be the fair market value as of that date?

A. I found the fair market value of the subject property as of December of 1953 to be $79,600.00. I would like to explain.

Q. Based upon your experience in the past as an appraiser and based upon your examination of the documents and the various examinations which you made, in your opinion would the price of $75,000.00 paid by Boys Markets have been a fair price for the acquisition of the fee of that land? A. It would.

Mr. Campbell: You may cross-examine.

Mr. Greaves: Just a moment, please.

Cross-Examination

By Mr. Greaves:

Q. How long did you spend in this appraisal?

[106]

(Testimony of Harold Monroe Hall.)

A. I worked on it constantly since the 11th of this month.

Q. That is, eight hours a day?

A. Yes, sir, and many hours in the evening at night.

Q. Now, you stated, I believe, that you compared sales of some of the properties? A. Yes, sir.

Q. In that area? A. Yes, sir.

Q. During 1953?

A. Sales that occurred in 1953.

Q. As recorded? A. Yes, sir.

Q. In the local Assessor's office?

A. Yes, sir.

Q. Were there many sales in December of 1953?

A. I picked up some 20 for which I considered to be the most valuable to this court.

Q. Comparable properties?

A. Which I considered to be comparable.

Q. Were any of them located on Valley Boulevard?

A. Yes, sir.

Q. Can you tell the Court the approximate distance from the intersection of Valley and Del Mar of the nearest one of these other properties sold? [107]

A. On Del Mar?

Q. No, on Valley nearest to Del Mar either east or west.

A. Yes, I found two pieces that were adjacent, one abutting the property on the east.

The Court: Facing on Valley?

The Witness: Facing on Valley, and another parcel right next to that adjacent to the first one of which

(Testimony of Harold Monroe Hall.)

I spoke which originally had been one piece of property, which was then broken into two pieces of property, which was then collected as one piece of property again and then sold.

The Court: It was sold in December of '53?

Mr. Campbell: I don't think he heard your question.

The Court said that was in December of 1953?

The Witness: I believe so. I was just going to look through the record to find the exact date, sir.

Pardon me. That last and final sale was in January of 1948. Then I have a sale—

By Mr. Greaves:

Q. I wonder if I might ask you, sir, what you are referring to there.

A. I am referring to supporting data, a map which I made up to show the location and relative size of the [108] properties involved.

Mr. Greaves: Does counsel intend to submit this into evidence in this case?

Mr. Campbell: I do not think it is necessary. If you want it in—

Mr. Greaves: I thought it might be helpful to the Court. I was just curious as to what this was.

The Court: Mr. Greaves, is the Government questioning the fair market value as of the date of the transfer from Mr. Goldstein to the corporation?

Mr. Greaves: The Government is attempting to assess what the fair market value would be, or determine, rather, what it would be.

The Court: You have charged $40,000.00 as additional income which is a difference between the $35,-

(Testimony of Harold Monroe Hall.)

000.00 Mr. Goldstein paid or had invested in it, and a sale price of $75,000.00. That would seem to be an acceptance of $75,000.00 as a fair market value of the property on the day it was transferred to the corporation. I am just curious. Are you really contesting that value?

Mr. Greaves: We are from one point of view, your Honor. Under our first theory of this case in the other estimation the fair market value is what a willing purchaser pays for it, and what a willing buyer sells it for, which was a transaction that happened between Mr. [109] Torley and Mr. Goldstein in June of 1952. We do not know what would occur between June and December that would increase the fair market value.

The Court: If you are attempting to prove that the fair market value was $35,000.00—

Mr. Greaves: We are attempting to determine what it was, not $35,000.00 or $75,000.00.

The Court: All right, proceed with the questioning.

By Mr. Greaves:

Q. Now, you say this piece of adjacent property was sold in 1948? A. In '48.

Q. Were there other sales in December of '53 that you have noted?

A. I have a sale of the southwest corner of Valley Boulevard and San Gabriel Boulevard which was a distance of—

Q. Just approximately would be fine.

A. Half a mile.

Q. About a mile?

A. Half a mile.

(Testimony of Harold Monroe Hall.)

Q. Half a mile?

A. Which was sold in January of 1953.

Q. Is that property of approximately comparable size? [110]

A. In size it is not of comparable size.

Q. Would you say that that intersection is more or less important as a commercial intersection than is the intersection of Valley Boulevard and Del Mar?

A. At that time it was considerably more important than the intersection of Del Mar because Del Mar was in such a deplorable condition because of the street, lack of street improvement south from Valley Boulevard. I have others; a sale in July, 1953, the southeast corner of Valley Boulevard and Lafayette Street.

Q. And where is Lafayette Street?

A. Lafayette Street is practically midway between the subject property and San Gabriel Boulevard.

Q. And how far?

A. approximately a quarter of a mile, and that sale at that time, that particular area was not developed commercially, and of course I am taking that into account.

The Court: When was that sale?

The Witness: That was in July of 1953.

By Mr. Greaves:

Q. July? I was just trying to ascertain whether there were any other sales in that area at that same time.

A. Yes, I have sales adjacent to the property south, too, on Del Mar Avenue.

(Testimony of Harold Monroe Hall.)

Q. You say sales adjacent to this property? [111]

A. Adjacent to this property on the south, adjacent to and abutting the property on the south, which I used to determine my opinion of the fair market value.

Q. And part of your appraisal, part of your opinion as to the fair market value of this property is based on the respective sales of these properties you have just mentioned? A. Yes, sir.

Q. Did they generally sell for more or less than this property, the so-called San Gabriel property we are discussing in this case?

A. This property is more permanently located than any of these others, and therefore if I might say that this is not a sale which is being considered here, it is merely establishing what the property would have sold for had it been offered on the open market. Under my usage of the definition the market value is the highest price which the property will bring when exposed on the open market to find a buyer after a reasonable time, knowing all the uses to which the property is adaptable and is capable of being used. That is the highest price.

Q. Did I understand from the direct examination prior to making this, prior to the commencement of this appraisal, you had occasion to see both the lease that was executed between the Boys Markets, the limited [112] partnership in 1945, and the Torley Land Company, as well as the title insurance policy on this property?

A. That was given to me in connection with the work which I was to do.

(Testimony of Harold Monroe Hall.)

Q. Now, are you aware of the provision in the lease for a 50-year term? A. Yes, sir.

Q. Commencing in November or on November 1st, 1945? A. Yes, sir.

Q. Would the fact, would this fact, that is, a long term lease on a piece of property, have any effect on its fair market value generally? A. Indeed.

Q. Would there be any effect, would the effect—and I will go into what this might be—I want to establish the line first—would the effect be greater on individuals who are not parties to the lease than on individuals who were in particular the lessee?

A. The lessee and the lessor would be—

Q. In particular the lessee?

A. The lessee would be very much involved and very particularly from a standpoint of value at that time.

Q. Now, in this particular situation, that is the land involved in this case and the parties to it, and any sales transaction, would there have been any effect on any [113] of these parties by virtue of the fact that there was a 50-year lease on this property?

A. Yes, sir.

Q. Would it have had less value to a third party than to the lessee? Would this land have had less value to a third party than to a lessee?

A. It would. Let us put it this way, if I may answer it this way.

Q. Surely.

A. First of all the property has to be appraised, and a determination made as to what the fair market

(Testimony of Harold Monroe Hall.)

value of the property would be if it were exposed on the open market.

Q. Yes, sir.

A. From that information can be gained, the full knowledge of the value or the knowledge of the full value to the lessor and the value to the lessee. In a case of this sort where a lease has been made under very favorable terms over a long period of time, the lessee has a package which he can market. It is a tangible asset. The determination of the value of the lessee's interest can be used to loan money. If the lessee is strong and in a favorable credit position the bank is willing to loan up to 100 percent on the established value of the leased fee after a determination for market value has been made by a [114] competent appraiser.

The Court: You mean 100 percent of the fair market value of the fee unencumbered?

The Witness: Well, the lessee's collateral which is put up.

The Court: And then the amount that they would be willing to loan would be what the fair market value of the lease is?

The Witness: Of the leased fee, yes, sir.

The Court: I see.

Mr. Campbell: I do not quite understand.

The Witness: That portion which belongs to the lessor. The ownership of property is the ownership of a bundle of rights, and when an individual or a corporation leases a piece of property, that bundle of rights passes almost entirely to them. They can sublease. This is a master lease.

(Testimony of Harold Monroe Hall.)

By Mr. Greaves:

Q. Before you go on, are you a lawyer?

A. No, sir, I am sorry. This is just my training as an appraiser. But the Boys Markets had something that was marketable at that time because of the increase in value of the land. They were in a position to sublease it to a very fine advantage to them. Is that the answer to your question? [115]

Q. I am not quite sure myself. I will have to wait until I get the transcript and see.

A. They were in a very favorable position.

Q. The lessee was in a very favorable position?

A. The lessee was in a very favorable position.

Q. Who was the lessee under that lease?

Mr. Campbell: I think that calls for a legal conclusion, your Honor, and I object to it.

The Court: Well, the lease I believe is in the record.

Mr. Greaves: Right.

By Mr. Greaves:

Q. Is it possible for an appraiser to go out and look at a piece of land with an improvement on it and completely detach himself from the value of this improvement in attempting to value the land?

A. It isn't easy, but it can be done. At least you do it to the best of your ability, and that of course is based on your experience. Having known a piece of land, when it was vacant, and then later coming in contact with the property after it was improved, and knowing the conditions which prevailed in the meantime, you are in a much more favorable position to do that than you would be if it was something cold to you.

(Testimony of Harold Monroe Hall.)

Q. Did you state on direct examination that you [116] were personally familiar with this area during the month of December of 1953?

A. I couldn't say that, no.

Q. Were you generally familiar with this area in 1953?

A. I was generally familiar with the area in 1953 having been closely associated with the improvement of Del Mar Avenue during those times of '52 and '53.

Q. Improvement on the south of this property?

A. Which was south of this property. My colleague and one who I had trained in the work with the County actually did the appraisal for Garvey Boulevard northerly to the San Gabriel City Line, but we were in very close connection.

Q. What is the amount of commercial development of this area, that is the area immediately surrounding the intersection at Del Mar Avenue and Valley Boulevard in the latter part of 1953?

A. The Market Basket building was well established on the northeast corner of Del Mar Avenue and Valley Boulevard. The actual corner of Del Mar Avenue and Valley Boulevard contained a service station and a dry cleaning plant on the southwest corner. Did I say "northeast" for Market Basket?

Q. Yes, you did.

A. I am sorry, it is the northwest corner, and [117] a service station and cleaning plant also occupied part of that property which at that time was owned by the Market Basket people. On the southwest corner was a service station and a new eating place extending to the

(Testimony of Harold Monroe Hall.)

west, real estate offices, and the Boys Markets had built at the southeast corner. I believe the property at that time adjacent to it, to the east, was vacant, and a row of buildings had been constructed. This was many years back on the northeast corner.

Mr. Greaves: I think that's all the cross-examination.

Mr. Campbell: Nothing further.

The Court: Is there any reason that this witness should stay around?

Mr. Greaves: No.

Mr. Campbell: No, he may be excused.

The Court: Thank you, Mr. Hall.

The Witness: Thank you.

(Witness excused.)

The Court: We will recess until 2:00 o'clock.

(Whereupon, at 12:45 o'clock, p.m. a recess was taken until 2:00 o'clock, p.m. of the same day.)

[118]

Afternoon Session

2:00 o'clock, p.m.

Mr. Campbell: Would you call Edward Goldstein?

If the Court please, I found this document I was looking for. It slipped off on the floor. It is the policy of title insurance. I will ask the Clerk to mark it so the Court can have it rather than a photostatic copy of it.

The Court: All right.

Whereupon,

EDWARD GOLDSTEIN,

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: Would you state your name and your address, please?

The Witness: Edward Goldstein, 85 Fremont Place, Los Angeles.

Mr. Greaves: May the record also show that this is a witness that the Government was forced to subpoena in this case?

Mr. Campbell: Now, just a minute. I am going to object to the statement in this record that the Government was forced to subpoena anybody. [119]

Direct Examination

By Mr. Campbell:

Q. Mr. Witness, were you ever requested by the Government to appear other than by the service of a subpoena? A. No.

Q. Has the Government ever up to this time ever discussed the facts of this case with you?

A. No.

Q. Or has anybody attempted to discuss them with you and you have refused to discuss them?

A. No.

The Court: The record will show that this is a witness subpoenaed by the Government.

Mr. Campbell: Yes, your Honor. I have no objection to that. Just to the word "forced."

The Court: We will strike the word "forced."

(Testimony of Edward Goldstein.)

Mr. Campbell: At this time I will offer the policy of the title insurance which is the original, a copy of which appears in the petition, and ask to have it marked in evidence.

The Court: Do you have any objection to receiving that?

Mr. Campbell: It is referred to in the stipulation, your Honor, as well. [120]

The Court: You have no objection?

Mr. Greaves: No objection.

The Court: Petitioners' No. 6.

The Clerk: No. 6, your Honor.

The Court: Will be received in evidence.

(Petitioners' Exhibit No. 6 was marked for identification and received in evidence.)

By Mr. Campbell:

Q. What is your business or occupation, Mr. Goldstein?

A. Officer of the Boys Markets.

Q. What office do you hold?

A. Vice president.

Q. And how long have you been a vice president of the Boys Markets?

A. Roughly I think it's about 12 years.

Q. Would it be since the time it became a corporation? A. Yes.

Q. And what are your duties in the corporation?

A. I am a produce supervisor.

Q. Will you describe what you mean by produce supervisor?

A. I go around to the stores, supervise the produce

(Testimony of Edward Goldstein.)

departments, the personnel, see that the merchandise is [121] kept fresh, clean.

Q. Do you hire and fire the personnel in the produce departments? A. Yes.

Q. And do you do the buying?

A. No.

Q. Who does the buying?

A. Max, Max Goldstein.

Q. One of your other brothers?

A. Yes.

Q. Does this job of supervising the produce portion of the markets occupy all of your time? I mean to say, is it a full time job?

A. It's a full time job.

Q. How many markets are you operating at this time? A. Eight.

Q. Eight markets. Now, was that your position also during the year 1953? A. Yes.

Q. According to the stipulation on file here, Mr. Goldstein, you were the owner of 1,294 shares of capital stock of Boys Markets or were in 1953, is that correct? A. Yes.

Q. You are also presently the owner of that number of shares? [122]

A. Yes.

Q. Now, during the year 1953 you were also a director of the corporation, were you not?

A. Yes.

Q. Did you occupy an office in the general offices of the corporation? A. Yes.

Q. Were you there daily during that period of time back in 1953? A. Yes.

(Testimony of Edward Goldstein.)

Q. And will you state what the custom was as among you and your other brothers and Mr. Eddy relative to discussions of the policies of the Boys Markets?

Would you discuss with them, talk among yourselves about what was to be done on various matters?

A. At all times when we were together we always did.

Q. Let me ask you this. Among the five brothers, which is the older?

A. Joe Goldstein.

Q. Joe is the oldest? Now how do you come in order after that?

A. Max, myself, Bernard and Albert.

Q. Albert is a brother who is no longer connected with the concern, is that correct?

A. That's right. [123]

Q. Is he now connected with a rival market chain?

A. Yes.

Q. The Food Giant, I believe it is called?

A. The Food Giant.

Q. But in 1953 he was employed by the corporation, is that correct? A. Yes.

Q. Now, do you recall in 1953 discussions among yourselves relative to the acquisition of the—I refer now to the early part of 1953—relative to any conversations among yourselves relative to the acquisition of the land located on Valley Boulevard in San Gabriel where your market out there is located?

A. Yes, I remember.

Q. And in that connection do you recall whether

(Testimony of Edward Goldstein.)

or not any conversations were had concerning the possibility of acquiring it by trade?

A. Quite a bit.

Q. And what position did you adopt in that matter?

A. I didn't want to have any part of it.

Q. Why?

A. Because it had to do with Las Vegas.

Q. Well, what was your antipathy to Las Vegas?

A. I beg your pardon?

Q. What was your animosity, what was your feeling [124] about Las Vegas?

A. I have been embarrassed up there too many times financially. I didn't want to have any part of it.

Q. You have had some previous unfortunate experiences, I take it? A. Sadly.

Q. Did you so express yourself to the other brothers? A. I did.

Q. And did you oppose any proposal as to the purchasing of land up there for the purpose of exchanging for the San Gabriel property?

A. Yes, I opposed it if we had to do it that way.

Q. Let me ask you this. Was it your understanding at that time that the only manner in which that property could be acquired at that time would be exchange of property?

Mr. Greaves: Objected to. These questions are tending to be leading.

Mr. Campbell: It is leading. I am trying to hurry it along if I can.

(Testimony of Edward Goldstein.)

The Court: I think I will sustain the objection to that. That was quite leading.

Mr. Campbell: All right.

By Mr. Campbell:

Q. How did you understand the acquisition of the [125] San Gabriel property was offered to you?

A. The way it was offered, that it had to do with some apartment houses in Las Vegas for us to get the fee to the land at Del Mar. As long as it involved anything in Las Vegas I didn't want to have anything to do with it.

Q. I see. And you so expressed yourself, is that correct? A. I did.

Q. Now, I call your attention to the minutes which have been read here into the record relative to the date of April 28, 1953 in which minutes it is stated, "It has now been decided that Joe Goldstein and Lillian Goldstein would buy this land—" referring to the San Gabriel property "—as their private property and they may at sometime in the future sell to the Boys Markets."

Did you participate in that decision?

A. I didn't hear you.

Q. Did you take part in the decision that the Boys Markets Corporation would not buy it, but that Joe and Lillian Goldstein might buy it as their own property? A. Yes.

Q. And I gather it was for the reasons that you have just stated? A. That's right.

Mr. Campbell: You may cross-examine. Pardon me. [126] I have made the examination purposely short

(Testimony of Edward Goldstein.)

and to this one point with a mind to expediting it, and I would like to confine the cross, unless the Government wants to take him as their own witness, to the matters gone into on the direct examination.

The Court: I understand.

Mr. Greaves: Do I understand, Mr. Campbell, that you have taken this witness as your witness in this case, this gentleman?

Mr. Campbell: This gentleman for the testimony that he has just given.

Cross-Examination

By Mr. Greaves:

Q. Mr. Goldstein, I believe you testified on direct examination that you had, as a member of the board of directors of the Boys Markets, Incorporated, informal meetings with other members relative to the San Gabriel property.

A. I didn't get the first part of your question.

Q. Did you as a member of the board of directors of Boys Markets, Inc. have informal meetings with other members of the board of directors relative to the purchase of the San Gabriel property?

A. Yes.

Q. Do you know whether minutes were kept in these meetings? [127]

A. In these meetings?

Q. These informal meetings which you had in which you discussed the purchase.

A. Minutes were kept, yes.

Q. For every meeting of the board of directors in

(Testimony of Edward Goldstein.)

which the San Gabriel property's purchase was discussed, minutes were kept?

A. I don't know if it was every one. I don't remember if at all meetings minutes were kept.

Q. And you did not take part in any meeting with any other member or any other members of the board of directors that did not have minutes kept by someone present at that time?

Mr. Campbell: Now, just a minute.

The Witness: I don't understand that.

Mr. Campbell: Pardon me. I object to the question in that form. That's a confusing question. That is an extremely confusing and compound question. "You did not meet with other members of the board in which minutes were not kept"? Now, these people were all brothers. They were meeting daily according to the testimony here. If counsel is referring to the board meetings as such, that is one matter, but simply a meeting with other members of the board does not so connote.

The Court: Yes, I think you had better clarify [128] it and let the witness know exactly what you are talking about.

By Mr. Greaves:

Q. Did you have informal discussions with other members of the board of directors of the Boys Markets, Incorporated at any time? A. Yes.

Q. At any of these meetings to which you have just testified to did you discuss or did others in your presence of the board of directors of the Boys Mar-

(Testimony of Edward Goldstein.)

kets, Incorporated discuss the purchase of a parcel of property in San Gabriel? A. Yes, we did.

Q. To your knowledge at any of these meetings or at all of these meetings were minutes kept?

A. Yes.

Q. Did you take part in any such discussion with other members of the board of directors relative to the purchase of the San Gabriel property in which minutes were not kept?

A. I still don't understand. Our meetings were informal. We always read the minutes.

Q. Minutes were kept whether the meetings were informal or formal? A. Yes. [129]

Mr. Greaves: Is this the book of minutes?

Mr. Campbell: Yes.

By Mr. Greaves:

Q. Do you know who kept these minutes?

A. Mr. Eddy.

Q. Now, there was a meeting of the board of directors on the 27th day of January, 1953. Did you attend that meeting?

A. I can't remember the exact date.

Q. Well, this was a meeting in which it was stated by the president that, "It might be possible to purchase the land now under lease on which we built the San Gabriel market, and the purchase of this land would enable us to procure a loan on the property and increase our working capital." This property being the San Gabriel property. A. Yes.

Q. There was a meeting also held on April 28, 1953 at which it was stated in effect, and I am read-

(Testimony of Edward Goldstein.)

ing from the minutes, "At a previous meeting there was a discussion about the possibility of purchasing the land on which the San Gabriel market was located. It has now been decided that Joe Goldstein and Lillian Goldstein would buy this land as their private property and they may at some time in the future sell it to the Boys Markets." Were you at that meeting? [130]

A. Yes, sir.

Q. Were there any other meetings of the board of directors during the early part of 1953 in which the matter of the Boys Markets or Joe Goldstein's purchase of this San Gabriel property was discussed?

A. I just can't remember. We talked about it quite often. I just can't remember.

Q. Now, you stated on direct examination that you wanted no part of the Las Vegas property which you would have to secure in order to trade with the Torley Land Company? A. Yes, sir.

Q. Why did you want no part of the Las Vegas property?

A. Just that I had been up to Las Vegas and I just don't care to have anything to do with Las Vegas for personal reasons.

Q. Well, would you have had to go to Las Vegas if the corporation purchased property in Las Vegas?

A. We didn't want to have anything to do with Las Vegas. We had very unpleasant things happen there.

Q. Mr. Torley lives in Las Vegas and you didn't want to have anything to do with him?

Mr. Campbell: Now, I suggest that is argumenta-

(Testimony of Edward Goldstein.)

tive, if the Court please. I object to that question in that form. [131]

The Court: Yes. I think I will sustain the objection to the question in that form. If you want to ask a direct question about Mr. Torley, it may be admissible.

By Mr. Greaves:

Q. What is your position in the Boys Markets, Mr. Goldstein? A. Vice president.

Q. You are also on the board of directors?

A. Yes, sir.

Q. Do you have a title on the board of directors?

A. I beg your pardon?

Q. Do you have a title on the board of directors?

A. A title?

Q. Yes, sir. A. Yes.

Q. What is that title?

A. Vice president.

Q. Of the board of directors of the Boys Markets, Incorporated? A. Yes.

Q. How did you acquire your stock in the Boys Markets? A. I didn't hear.

Mr. Campbell: Objected to as immaterial.

Mr. Greaves: I believe you went into that on [132] direct examination and I would just like to get an answer from this witness on that.

Mr. Campbell: No, I did not. I asked him how many shares he had.

The Court: Well, you asked questions about whether he was a stockholder. I think that this may be material. I will overrule the objection.

(Testimony of Edward Goldstein.)

Mr. Campbell: Very well. You may answer the question.

The Witness: What is the question again?

By Mr. Greaves:

Q. How did you acquire your stock in the Boys Markets, Inc.?

A. Through bonuses, dividends,—not dividends—bonuses.

Q. Did you purchase any of it?

A. Did I purchase any of it? With my bonuses, yes.

Q. Did you purchase any from anyone else other than the company? A. No.

Q. That is from Joe Goldstein or from other stockholders of the corporation?

A. From the Boys Markets.

Q. From no members, no stockholders of the Boys Markets did you purchase stock? [133]

A. I don't even remember.

Q. Did you acquire any stock from the Boys Markets as a result of the transfer of assets of the limited partnership to the Boys Markets, Incorporated?

A. I can't remember that. I think it was just through bonuses.

Q. Now, as an officer and director and shareholder of this corporation you are familiar with the transaction concerning the San Gabriel property, are you not?

A. A little bit. Mr. Eddy and Joe, Mr. Eddy handled most of it. My other duties kept me busy. That was my part of it.

(Testimony of Edward Goldstein.)

Q. Did you as a director of this corporation authorize or agree to allow Joe Goldstein and Lillian Goldstein to sell this property to the corporation?

Mr. Campbell: Now, just a minute. Objected to, if the Court please.

Mr. Greaves: It is set forth in the minutes of the corporation dated April 28, 1953.

The Court: I think the way the question was stated "Did you agree or authorize the corporation to buy from Joe Goldstein as stated in the minutes"—

Mr. Greaves: I believe that was substantially what I said.

The Court: I don't believe it is stated that [134] way in the minutes as I recall.

Mr. Greaves: Strike that, and let me rephrase it, if I may.

By Mr. Greaves:

Q. Did you as a member of the board of directors acquiesce— A. What?

Q. Did you as a member of the board of directors agree that Joe Goldstein and Lillian Goldstein would in the future be able to sell the San Gabriel property to the corporation?

Mr. Campbell: Just a minute. That's objected to as also misstating the—

The Court: Yes, I think you had better read from the minutes, if you would, please, if you are referring to this particular minute.

By Mr. Greaves:

Q. I am reading from the minutes of the Boys Markets, Incorporated dated April 28, 1953. I will

(Testimony of Edward Goldstein.)

read a sentence from these minutes and ask you then whether or not you agree with the statement herein made. "It has now been decided that Joe Goldstein and Lillian Goldstein would buy this land as their private property, and that they may at sometime in the future sell it to the Boys Markets." [135]

A. Yes.

Q. You agree? A. Yes.

Q. To that as one of the directors of the Boys Markets? A. Yes.

Q. As a director of the Boys Markets did you have any contact with the seller of this property?

A. No.

Q. Who did? A. Mr. Eddy.

Q. Exclusively to your knowledge?

A. No, not to my knowledge.

Mr. Campbell: Just a minute. That's calling for his conclusion.

The Court: You didn't let him finish his answer in the first place. He was about to add another name, I believe—weren't you, Mr. Witness?

The Witness: Yes.

The Court: Just complete your answer to the first question.

The Witness: Mr. Eddy and Joe Goldstein. That was their duties.

By Mr. Greaves:

Q. And now as an officer of the corporation I [136] believe you stated your duties were as a produce buyer or manager? A. Supervisor.

(Testimony of Edward Goldstein.)

Q. Supervisor. As a director of the corporation did you have any duties?

Mr. Campbell: I object to that if the Court please. The duties are laid on him by the law and by the by-laws of the corporation.

The Court: Well, I think it is possible that a board may at times assign particular duties to a particular member of the board. I will overrule the objection and let him answer it.

The Witness: No, I had no duties that way.

By Mr. Greaves:

Q. No duties other than those imposed upon you by the law and by the by-laws of the corporation?

A. Yes.

Q. Are you familiar with what those duties amount to?

Mr. Campbell: Objected to as immaterial.

The Court: What is the purpose of this question?

Mr. Greaves: As an officer of this corporation, your Honor, I believe one of this witness' duties were to protect the corporation generally. I therefore would ask him why he did not or why he himself did not or why he did not authorize others. [137]

The Court: You ask him if he is familiar with the duties that are imposed upon him by the laws and by-laws. That's a pretty broad question. I think I would be here all afternoon if he knew.

Mr. Campbell: It seems to me all he can say is what he did. Then it is for the Court to measure whether what he did was proper or improper, and he has previously answered counsel and told him what he did, the

(Testimony of Edward Goldstein.)

position he took. It is not a matter for his determination whether that was proper or improper. It would be argumentative to proceed on that line.

The Court: Well, Mr. Witness, can you answer the question that was asked yes or no? The question was,—

The Witness: I wouldn't want to answer it yes or no.

The Court: Well, I think that is your answer, Mr. Greaves.

Mr. Greaves: I didn't hear that answer.

The Court: He said he wouldn't want to answer it yes or no.

By Mr. Greaves:

Q. At the time you learned of the negotiations between the Torley Land Company and individual members of your corporation did you know that the corporation could have purchased this property for $35,000.00? [138]

A. I—

Mr. Campbell: Just a minute. Pardon me. I do not think that is proper cross-examination and it is assuming a fact not in evidence, if the Court please.

The Court: Well, he is asking a question whether he knew the corporation could purchase it for $35,000.00.

Mr. Campbell: Well, that question assumes that fact to have been established that the corporation could purchase it for $35,000.00.

The Court: Well, it may or may not, depending on

(Testimony of Edward Goldstein.)

how you interpret the question. I do not think it necessarily assumes anything.

You may answer the question.

The Witness: I can't remember that.

By Mr. Greaves:

Q. In December of 1953 did you as a member of the board of directors of the Boys Markets, Incorporated vote in favor of your corporation purchasing this property from Mr. and Mrs. Joe Goldstein?

A. Yes.

Q. What reasons did you as a director have for wishing to purchase that property for your corporation at that time?

Mr. Campbell: Objected to as immaterial, not [139] within the issues here, calling for his conclusion.

The Court: I will overrule the objection.

You may answer. Do you remember the question?

The Witness: Yes, I do. The reason for acquiring the property is that so that we could borrow money on it.

By Mr. Greaves:

Q. Wouldn't that same reason have existed in June or earlier in 1953?

Mr. Campbell: Objected to as argumentative, if the Court please.

The Court: Overruled.

The Witness: I would have to state what I said before.

By Mr. Greaves:

Q. I don't know what that is, sir.

(Testimony of Edward Goldstein.)

A. If it had anything to do with Las Vegas I wasn't in favor of it.

Q. Did you as a director of the corporation know at the time you authorized the purchase of the San Gabriel property from Mr. and Mrs. Joe Goldstein that your corporation was a lessee of this property? You don't know that?

A. I don't remember that exactly. Yes. I can't remember that.

Q. Did your corporation lease this property from [140] the Torley Land Company?

A. There is a lot of these things that I just don't remember. Mr. Eddy handled them. It was Torley. I don't know the proper name. It was Torley.

Q. Did you know that your corporation leased this property from someone? A. Yes.

Q. Did you know that your corporation's lease still had an unexpired period of 42 years or 41 years and 10 months as of December 1, 1953?

A. I don't remember.

Mr. Campbell: I didn't get that answer.

(The answer was read.)

The Witness: I don't remember.

By Mr. Greaves:

Q. Do you know how much rent your corporation paid as lessor under the lease? A. No.

The Court: Mr. Witness, will you speak up a little louder in your answers, please?

The Witness: Yes.

(Testimony of Edward Goldstein.)

By Mr. Greaves:

Q. Mr. Goldstein, I show you Joint Exhibit No. 2-B in this case which is—rather, would you tell me what this is and what this is titled? [141]

A. Lease.

Q. Between whom?

A. Torley Land Company and the Boys Markets.

Q. The Boys Markets, a limited partnership?

A. Yes.

Q. I wonder if you would tell me whose signature appears on this lease signing on behalf of the lessee, the Boys Markets?

A. Joe Goldstein, Edward Goldstein, Joe Goldstein, his attorney, Joe Goldstein as trustee for Max Goldstein.

Q. Did you sign this? A. Yes, sir.

Q. That's your signature? A. Yes.

Q. And you knew nothing about the lease or the terms therein? A. I can't—

Mr. Campbell: Just a minute. That's assuming a fact he did not say. He said he doesn't remember now. He doesn't say that he didn't know at that time.

The Court: It is a double question. Why don't you ask him one at a time.

Mr. Greaves: All right, sir.

By Mr. Greaves:

Q. Do you know at this time now that I have refreshed [142] your memory by showing you the lease what the original term of that lease was?

A. We discussed the lease. I can't remember those

(Testimony of Edward Goldstein.)

things. We have a man that takes care of those things, Mr. Eddy, who reads them, checks them.

Q. Pardon me? A. And checks them.

Q. At the time you voted in favor—at the time you as a director of your corporation voted in favor of its acquisition of the San Gabriel property from Joe Goldstein and Lillian Goldstein—strike that.

At the meeting in which it was voted that the Boys Markets, Inc. would purchase the San Gabriel property from Joe Goldstein and Lillian Goldstein was the matter of this lease discussed to your knowledge?

A. I just can't remember.

Q. Did you know how much Joe and Lillian Goldstein paid for the property?

A. I did at the time. I have to say again I can't remember those figures.

Q. When did you know that you were going to become a witness in this case? A. When?

Q. That's right.

A. When I was subpoenaed. [143]

Q. Have you talked to anyone since that time about this case? A. The attorney.

Q. Did you appear in his office willingly?

A. Yes.

Q. Did you do so out of friendship for the petitioners?

Mr. Campbell: I object to this line of questioning, your Honor. I see no purpose in it. We are wasting the time of the record.

The Court: I do not think it is going to be very material, but I will let him answer this question.

(Testimony of Edward Goldstein.)

The Witness: I didn't hear it.

By Mr. Greaves:

Q. Did you appear at Mr. Campbell's office out of friendship for the taxpayers, Mr. and Mrs. Goldstein?

A. Well, I can't answer as a business. Friendship, yes.

Q. And were you present—pardon me, strike that. Was this case discussed at that time?

A. Yes.

Q. Was the amount that Joe and Lillian Goldstein paid for this property also discussed at that time?

Mr. Campbell: I am going to object, if the Court please. This is entirely a collateral matter. If [144] counsel is of the opinion that this witness' testimony has been in some way tampered with, let him ask the direct impeaching question.

Mr. Greaves: I am attempting to get this, to jog this witness' memory with respect to the amount.

Mr. Campbell: As counsel I have the right to talk to the witnesses, and he has the right to come to my office and discuss the case and all of the details. And the discussion that took place there is not evidentiary, unless it is for the purpose of impeaching his testimony as to what the true facts are.

The Court: I agree with that. However, Mr. Greaves said the purpose of this line of questioning was to refresh the witness recollection. I think that that's permissible for that purpose.

Mr. Campbell: Except Mr. Greaves wasn't there, your Honor.

(Testimony of Edward Goldstein.)

The Court: Well, the witness has said that he was there.

Mr. Campbell: Yes.

The Court: And it was discussed.

I will overrule the objection. Do you want to rephrase the question or ask it again, please?

By Mr. Greaves:

Q. Now,— [145]

Mr. Greaves: I would like it read, if it please the Court.

The Court: Will you read the question back?

(The question was read.)

The Witness: At the attorney's office?

By Mr. Greaves:

Q. Yes. A. No.

Q. It was not? A. No.

Q. If I were to tell you that he paid $35,000.00 for this property— A. Sir?

Q. If I were to tell you at this time that he paid $35,000.00 for this property, would that refresh your recollection?

Mr. Campbell: Well, just a minute. If counsel were to tell him that that wouldn't be the situation because the stipulation shows that other property was exchanged for it—

Mr. Greaves: I will stand corrected on that, your Honor. Thank you, Mr. Campbell.

By Mr. Greaves:

Q. Did you know the value of the property exchanged?

(Testimony of Edward Goldstein.)

Mr. Campbell: That's objected to as calling [146] for his conclusion. He can ask him if he wants, how much the Goldsteins paid for the property in exchange.

The Court: Yes. I think the value of that Las Vegas property hasn't come into it yet.

By Mr. Greaves:

Q. Do you know the amount the Goldsteins paid for certain property and improvements thereon in Las Vegas in exhange for this San Gabriel property?

A. No, I don't.

Q. Do you know how much the corporation paid to the Goldsteins for the San Gabriel property?

A. I can't remember the figures.

Q. Have you ever sold any property to the Boys Markets, Inc.? A. Have I? No.

Q. In your personal capacity, Mr. Goldstein?

A. No.

Q. Have other members of the board of directors?

Mr. Campbell: Objected to as not proper cross-examination.

The Court: I think you are going beyond the scope of the direct examination.

Mr. Greaves: All right.

The Court: If you want to of course you can make the witness your own. [147]

Mr. Greaves: I think I would be making him an adverse witness.

I have no further questions.

Mr. Campbell: Just one or two questions on redirect.

(Testimony of Edward Goldstein.)

Redirect Examination

By Mr. Campbell:

Q. Mr. Goldstein, you were asked about various figures and you say you don't remember. At the time of this transaction, some six years ago, you knew the figures at that time? A. Yes.

Q. But you don't recall them at this time?

A. I haven't given them a thought since.

Q. And, Mr. Goldstein, something was said about how you paid for your interest. As I understood you it was money received by you as bonuses?

A. Yes.

Q. And was that part of your compensation that you should receive bonuses? A. Yes.

Q. And that money you converted into the purchase of stock? A. Of the stock.

Mr. Campbell: That's all. [148]

The Court: Any questions?

Recross-Examination

By Mr. Greaves:

Q. Did you not testify that the company had a stock bonus plan? A. No, I didn't.

Q. So you purchased all of your stock from the corporation? A. With my bonuses.

Q. Cash bonuses?

A. It was turned back in.

Q. I am sorry, I didn't hear that. I wonder if you could speak up just a little bit?

A. The bonuses that accumulated were turned into stock.

(Testimony of Edward Goldstein.)

Q. This is in addition to your salary?

A. Yes.

Q. Did the Boys Markets give its directors or officers bonuses every year? A. No.

Q. What were the bonuses based on?

A. Based on profits.

Q. Did this company make profits every year?

A. No.

Q. Did it make profits in 1953? [149]

A. I don't recall the year, no. I couldn't answer yes or no.

Q. But you can answer that it did not make profits in some years? A. Yes.

Q. From the time it became a corporation in 1946—

Mr. Campbell: I think we are getting beyond the scope of the redirect examination, if the Court please, and I am going to object upon that ground. The matters are immaterial.

The Court: I think that he has pretty well answered your question, anyway, Mr. Greaves. I wouldn't pursue it unless you want to bring something further out.

Mr. Greaves: No, I think that's all.

Mr. Campbell: That's all.

May this witness be excused? He is under subpoena.

Mr. Greaves: No, I think we had better keep him in case we have rebuttal.

The Court: Mr. Goldstein will have to go back in, then.

(Witness excused.)

Mr. Campbell: Mr. Max Goldstein, please. [150]

Whereupon

MAX GOLDSTEIN,

a witness called for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: Would you state your name and address, please?

The Witness: Max Goldstein, 5107 Holt Avenue.

Mr. Campbell: Los Angeles?

The Witness: Yes.

Mr. Campbell: Will you keep your voice up, Mr. Goldstein, so everybody can hear you? The sound effects are very bad in here.

The Witness: Yes.

Direct Examination

By Mr. Campbell:

Q. What is your business or occupation?

A. Co-owner of Boys Markets.

Q. And what is your title?

A. Vice president.

Q. Are you also a member of the board of directors? A. Yes.

Q. How long have you been vice president of the Boys Markets? A. Oh, since—

Q. Since it started? [151]

A. Well, first it was a partnership and then it was incorporated.

Q. But you have been vice president ever since the corporation came into existence, is that correct?

A. Yes.

Q. It has been stipulated that you were during 1953 the owner of 1,271 shares of the 5500 shares outstanding of that corporation. Is that correct?

A. Yes.

(Testimony of Max Goldstein.)

Q. Now, do you recall in 1953, Mr. Goldstein,—pardon me, strike that.

What were your duties with the—what are your duties with the corporation as vice president? What do you do?

A. Well, right now I am more or less supervisor of the produce departments.

Q. Along with your brother? A. Yes.

Q. What were you doing in 1953?

A. Produce buying.

Q. Produce buying? A. Yes.

Q. That's a large part of the market business?

A. At that time it was. It took most of the day.

Q. That is a day-to-day operation, is it not? [152]

A. Yes.

Q. As compared to grocery buying, let us say?

A. Yes.

Q. Now during 1953 did you occupy an office at the general offices of the company? A. Yes.

Q. Along with your other brothers?

A. Yes.

Q. And during that period of time was it the practice among you and with Mr. Eddy to discuss affairs from day to day? A. Yes.

Q. And do you recall during the—

Mr. Greaves: I wonder if we could get a little more definite answer to that. That is, will you state generally did you discuss the business affairs from day to day, that doesn't mean anything.

Mr. Campbell: I am going to come to the specific matter now.

The Court: Go ahead.

(Testimony of Max Goldstein.)

By Mr. Campbell:

Q. Do you recall early in 1953 any discussions had between you and your other brothers relative to the possible acquisition of the land upon which your San Gabriel market is located? [153]

A. Yes, we did.

Q. And do you recall a discussion as to how or in what manner such land could be acquired?

A. Yes.

Q. What was that discussion and whom did you have it with?

A. Well, we all talked about it.

Q. When you say "we all," to whom do you refer?

A. My brothers and Mr. Eddy and Mr. Joe Goldstein and Bernie and—

Q. In other words, the five brothers and Mr. Eddy, is that correct? A. Yes.

Q. What was said with regard to it, as to how and what the proposition was?

A. Well, we talked about acquiring the land, if we wanted to buy a piece of property in Las Vegas, and we just didn't want to buy any land in Las Vegas.

Q. When you say "we," to whom do you refer?

A. Well, Eddie and Joe, Bunny, Al.

Q. What was your own—what was your position in the matter?

A. Well, I just didn't want to buy any land in Las Vegas.

Q. Why? [154]

A. I just didn't want any part of Las Vegas.

Q. Well, what was the reason, Mr. Goldstein, with-

(Testimony of Max Goldstein.)

out detail? You had some unfortunate experience there?

A. Yes, we had, and I just didn't want to have anything to do with Las Vegas.

Q. When you say "we," do you refer to your brothers as well as yourself? A. Well, I didn't—

Q. What's that?

A. I didn't want anything to do with Las Vegas.

Q. And did you so express yourself to your other brothers? A. I did.

Q. I call your attention to the minutes of April 28th wherein it says, "At a previous meeting there was a discussion about the possibility of purchasing the land on which the San Gabriel market was located. It has now been decided that Joe Goldstein and Lillian Goldstein would buy this land as their private property." Did you participate in that discussion?

A. Yes, I did.

Q. And what was your position in the matter, what position did you take?

A. Well, I took the position that if they wanted to buy the land they could buy it and I just didn't want [155] to buy it myself or any part of it.

Q. I see. Was that your only objection to the deal, that it involved Las Vegas?

A. Las Vegas, yes.

Q. Now the records here show that subsequently some seven or eight months after that meeting and after the land had been acquired by Joe and Lillian Goldstein, the property was purchased by the corporation for $75,000.00 from them. Do you recall that?

A. Yes.

(Testimony of Max Goldstein.)

Q. Did you participate in the decision to buy the property at that time? A. Yes, I did.

Q. And what were the reasons that you had at that time?

A. Well, for the Boys Markets buying the property?

Q. Yes.

A. Well, I thought it would be good for the Boys Markets to have the property.

Q. Was there any intention—strike that—was there any discussion then or at any other time in connection with that transaction of diverting a portion of the profits or the money of Boys Markets to Joe and Lillian Goldstein? A. No, there wasn't. [156]

Q. As far as you were concerned did you or did you not feel that that was a fair price to pay for the property?

A. Yes. We had had it appraised.

Q. When you say "We had it appraised," to whom do you refer?

A. Eddy and myself, Bunny.

Q. Did you make some appraisal yourself at that time? A. No.

Q. Whom did you have do that?

A. We had a man come in.

Mr. Greaves: I beg your pardon?

The Witness: A real estate man.

By Mr. Campbell:

Q. Do you recall who he was?

A. I don't remember his name now.

(Testimony of Max Goldstein.)

Q. But do you recall that you did discuss it with a real estate man at that time? A. Yes.

Q. And as a result of that discussion I take it that was had before the purchase of the property—

A. Yes.

Q. Now, prior to your appearance on the stand here were you at any time approached or questioned or sought to [157] be questioned by the Revenue Agents? A. No.

Q. Revenue Agent Goodman who made the investigation in this case? A. No.

Q. Or by any other Government agent?

A. No.

Q. You have, however, talked to me concerning the case? A. Yes.

Q. And that was within the last day or so, is that correct? A. Yes.

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Greaves:

Q. You are the vice president of the Boys Markets?

A. Yes.

Q. Are you first, second or third vice president or just vice president?

A. Just vice president.

Q. How did you acquire your stock in the corporation?

A. Well, that goes back a number of years. We had all worked together and we got bonuses and we bought stock in the company. [158]

(Testimony of Max Goldstein.)

Q. It goes back a number of years, you say?

A. Yes.

Q. To what?

A. I don't remember the exact time.

Mr. Campbell: Will you keep your voice up, Mr. Goldstein, so I can hear you?

The Witness: Yes.

By Mr. Greaves:

Q. Did you ever make a gift of stock to anyone in this corporation? A. Yes, I did.

Q. To whom? A. Mr. Eddy.

Q. How many shares?

Mr. Campbell: I didn't get the answer to whom?

The Witness: Mr. Eddy.

By Mr. Greaves:

Q. How many shares? A. Five.

Q. When?

A. Oh, it was either in—gee, I don't remember the exact date.

Q. Can you give us an approximate date?

A. It was around 1954 or '55.

Q. You remember all about this transaction of the [159] San Gabriel property, but you can't remember the subsequent year in which you gave stock to somebody?

Mr. Campbell: That's objected to as argumentative, if the Court please.

The Court: I will overrule the objection.

The Witness: What was the question?

Will you answer the question?

(The question was read.)

(Testimony of Max Goldstein.)

The Witness: Well, I don't remember the exact date.

By Mr. Greaves:

Q. I am just asking you for a year.

A. It was either in '53 or '54. I just don't remember.

Q. But you can't say which?

A. No, I can't.

Q. How does your job with the Boys Markets differ from that of Edward Goldstein?

A. Well, I done all the produce buying which started about 1:00 o'clock in the morning and took the better part of the day.

Q. What did Edward Goldstein do?

A. He was the supervisor.

Q. Your supervisor?

A. Yes, he was under me. [160]

Q. Yes.

Mr. Campbell: I think you are talking at cross purposes now, counsel. If you ask another question I think you can straighten it out.

By Mr. Greaves:

Q. You were Edward's boss?

A. Indirectly.

Q. He was under you? A. Yes.

Q. Indirectly or directly?

A. Indirectly. He answered to me.

Q. Indirectly, but he answered to you?

A. Yes.

Q. Did you attend every meeting of the board of directors of the Boys Markets?

(Testimony of Max Goldstein.)

A. Well, we had informal meetings.

Q. Did you attend every formal meeting?

A. I really don't know how many formal meetings we had.

Q. In these informal meetings you discussed were minutes kept?

A. Yes.

Q. Was the meeting that Mr. Campbell read—strike that. I will rephrase it.

In the meeting of April 28, 1953, the meeting of [161] the minutes Mr. Campbell read to you a few moments ago, was that a formal or informal meeting?

A. I just don't remember that far back.

Q. Well, you remember the transaction involved?

A. Well, I just don't remember whether it was an informal or a formal meeting.

Q. Is there any distinction between the two as far as the Boys Markets is concerned?

A. Yes. When we had a formal meeting we all gathered in the office and had a meeting. On our informal meeting maybe I would talk to one or two or three of us or four of us would talk and then we would call it a meeting.

Q. Do you recall a meeting that these minutes Mr. Campbell read to you from pertain to? A. Yes.

Q. Was it a formal or informal meeting?

A. It was a formal meeting.

Q. It was held in the office? A. Yes.

Q. Where were informal meetings held?

A. Where were they held?

Q. Yes.

(Testimony of Max Goldstein.)

A. In Joe Goldstein's office.

Q. All of them?

A. Yes. [162]

Q. Never in a warehouse or other places?

A. No.

Q. Did everyone attend these informal meetings, everyone on the board of directors?

A. The informal?

Q. Yes.

A. No, not the informal.

Q. Did Edward Eddy attend all those meetings?

A. Which meetings?

Q. The informal meetings?

A. The informal, no.

Q. Who kept the notes for minutes when he wasn't there?

A. Oh, sometimes Al Goldstein did, sometimes I did. We passed them on to Mr. Eddy.

Q. Now, calling your attention to the meeting of April 28th, 1953 were you in favor of the Golsteins' purchase of the San Gabriel property in their own name, you as director?

Mr. Campbell: You are referring to Joe and Lillian Goldstein?

Mr. Greaves: I am sorry, Joe and Lillian Goldstein.

The Witness: Was I in favor of it?

By Mr. Greaves: [163]

Q. Yes.

A. It just didn't make any difference to me who bought it.

(Testimony of Max Goldstein.)

Q. Do you know how much the property that they purchased in Las Vegas cost them?

A. No, I don't.

Q. Did it cost them $35,000.00?

A. I don't know.

Q. Was the purchase of this property discussed in your presence by anyone?

A. Was it discussed? Yes.

Q. But not the price? A. No.

Q. As a director of the corporation did you know how much they were paying for it?

A. I wasn't interested in what they were paying for the property.

Q. Were you interested in what you as a director of the corporation authorize the corporation to pay for it at the time they did purchase it from the Goldsteins, Joe and Lillian? A. Yes.

Q. Why?

A. Because I was part of the corporation.

Q. In the April 28th meeting the board of directors [164] decided that Joe and Lillian Goldstein would buy this land for their private property and they may at sometime in the future sell it to the Boys Markets. Why weren't you interested in what they paid for it when you as a director were apparently willing to purchase this property from them?

A. Well, we had an appraisal from a reliable source.

Q. But you had no concern with what the purchasers, what Joe and Lillian were paying for this property?

Is that correct, did you or did you not have concern

(Testimony of Max Goldstein.)

for what Joe and Lillian were paying for this property as a director of the corporation?

A. Well, I had a concern, but when it was appraised that was the appraisal price.

Q. When was it appraised?

A. By the man that appraised it. I don't know what the date was.

Q. Was it the first part of 1953?

A. I really don't remember.

Q. Or the last part of 1953?

A. I just don't remember.

Q. But you are sure there was an appraisal?

A. Yes.

Q. Well, now, you testified on direct examination that you weren't interested in purchasing the San Gabriel property from the Torley Land Company because it would have [165] involved your having to get property in Las Vegas. Is that correct?

A. What was that?

Q. You stated on direct examination, I believe, that the reason you were not interested as a director of the corporation in purchasing the San Gabriel property was that you would have to buy the property in Las Vegas in exchange?

A. That's right.

Q. Is that the only reason?

A. That's the only reason.

Q. What was that based upon?

A. I just don't like Las Vegas.

Q. Why? Too much gambling? A. Well,—

(Testimony of Max Goldstein.)

Q. Sin, drinking?

A. That's right.

Q. All those things you don't like?

A. I like them.

Q. Any other reason?

A. I like them but that's my weakness.

Q. So you avoid Las Vegas?

A. As much as I can.

Q. Personally? A. Personally. [166]

Q. Have you been there in the last five years?

A. I have been there once in seven years, I think.

Q. Is there any reason why you would have to go to Las Vegas if the corporation purchased property there?

A. Well, I think I would have had to go down there, yes.

Q. If the corporation had purchased a lot and had built on that lot a fourplex apartment building you as the producer purchaser would have had to go to Las Vegas?

A. At that time I probably would have made it my business to go down there as a director.

Q. But you didn't make it your business as a director to find out how much Joe was paying for it?

Mr. Campbell: I object to it as argumentative now, if the Court please. He has given the answer, and this is in the form of argument.

The Court: I think I will overrule the objection.

Mr. Campbell: Answer the question.

The Court: It is simply a statement that he has made. You haven't asked a question yet, I don't think.

(Testimony of Max Goldstein.)

By Mr. Greaves:

Q. Why, if you would have concern for a property in Las Vegas didn't you also have concern for what Joe was paying for this property?

A. Well, I knew we would get a fair price for the [167] property. I mean it wasn't a question.

Q. Did you think they paid $75,000.00?

Mr. Campbell: Wait a minute. He didn't finish his answer.

Mr. Greaves: I am sorry, I thought he did.

The Witness: The land was appraised by a real estate man.

By Mr. Greaves:

Q. Now, Mr. Goldstein, calling your attention to the stipulation of facts in this case—strike that.

Did you know, Mr. Goldstein, that your brother and sister-in-law paid $35,000.00 for the property in Las Vegas that they exchanged? A. No, I don't.

Q. Do you know it now that I have stated it?

A. Yes.

Q. What did your corporation pay for this property?

Mr. Campbell: For which property now?

Mr. Greaves: The Las Vegas property, the only one they purchased.

Mr. Campbell: They never purchased in Las Vegas property.

The Court: The San Gabriel property.

Mr. Greaves: The San Gabriel property.

By Mr. Greaves:

Q. What did your corporation pay to Joe and Lillian [168] Goldstein for the San Gabriel property?

(Testimony of Max Goldstein.)

A. I don't follow you.

Q. Now,—

Mr. Campbell: Do you understand the question?

The Witness: No, I don't.

By Mr. Greaves:

Q. Did the corporation purchase the San Gabriel property? A. Yes.

Q. From whom?

A. From Mr. Torley.

Q. Your corporation purchased it from Mr. Torley?

A. No, no, we didn't, not the corporation, no. We had a building on there and we didn't—it wasn't our property.

Q. When did it become the corporation's property?

A. Well, after they transacted the business of the Las Vegas deal, I guess.

Q. Whom do you refer to as "they"?

A. Joe and Lillian and Mr. Torley.

Q. And it became the corporation's property at that time? A. No.

Q. When did it become the corporation's property?

The Court: He answered the question once, right [169] after the transaction between Joe and Lillian Goldstein and Torley.

By Mr. Greaves:

Q. Well, do you know just when? Can you be more specific?

A. No, I can't. I don't know the exact dates.

Q. Was it in 1953?

A. I don't know the date.

(Testimony of Max Goldstein.)

Q. Are you a member of the board of directors of the corporation? A. Yes.

Q. Are you an officer in this corporation?

A. Yes.

Q. Are you a shareholder in this corporation?

A. Yes.

Q. Are you interested in your corporation's business?

A. Yes.

Q. Did you vote as a member of the board of directors to purchase the San Gabriel property?

A. Yes.

Q. Do you know when you voted—do you know in what year you voted?

A. Well, I don't remember the exact year either now.

Q. Do you know how much you voted to pay for this? [170]

A. No, I don't remember.

Q. Did you know at the time how much you voted to pay for this property?

A. I just don't remember.

Q. But you were in favor of purchasing this property for your corporation?

A. Of purchasing the San Gabriel property?

Q. That is correct, sir.

A. No, I wasn't in favor of it.

Q. Were you in favor of purchasing this San Gabriel property from Joe and Lilliam Goldstein?

A. Yes.

(Testimony of Max Goldstein.)

Q. Do you know when you purchased it from Joe and Lillian Goldstein as a director of your corporation?

A. I don't, the exact date I don't remember.

Q. Do you remember the year?

A. No, I don't.

Q. Do you remember the particular individual director's reason for thinking you should purchase this property from Joe and Lillian Goldstein?

A. Well, we thought it was a good investment.

Q. I am asking what you thought. What did you think? A. Yes.

Q. You thought it was a good investment? [171]

A. Yes, for the Boys Markets.

Q. Based upon what? What was your opinion based upon?

A. The land value, and having the market there.

Q. Did you say you were in Mr. Campbell's office yesterday?

A. Yes.

Q. Did you discuss this case?

A. Well, a little bit of it.

Q. I beg your pardon? A. Yes.

Q. To your recollection at this time was any mention made of the amount paid by Joe and Lillian Goldstein for the Las Vegas propety? A. No.

Q. To your recollection at this time was any mention made in Mr. Campbell's office with respect to the amount the corporation paid Joe and Lillian Goldstein for this property? A. No.

Q. Do you remember the meeting at all of yesterday? A. Yes.

(Testimony of Max Goldstein.)

Q. Do you remember who was there?

A. Yes, I do.

Q. Did you know or do you know at this time that [172] when your corporation purchased the property from Joe and Lillian Goldstein it was the lessee, that is the corporation was the lessee of that property?

A. I don't—I didn't get the question.

Q. Prior to the time your corporation bought the San Gabriel property, what was the nature of its being on there? How was it on that property? Did it have a lease? Did it own the property? What?

A. I still don't follow you.

The Court: It didn't own it prior to the time the corporation bought it from Joe and Lillian.

The Witness: About the Boys Market on it?

The Court: How did it operate the market?

The Witness: We had a ground lease.

The Court: That is what he is asking.

By Mr. Greaves:

Q. Now, do you know how long that ground lease had remaining?

A. No, I don't.

Q. Do you know how long the ground lease was for originally? A. No.

Q. Do you know how much rent the corporation paid? A. No.

Q. As a director you had no concern with that? [173]

A. Well, I had concern, but the financial end was left to Mr. Eddy, and my end was just a produce buyer.

(Testimony of Max Goldstein.)

Q. Did Mr. Eddy run this corporation?

A. No.

Q. He apparently did according to you. He knows everything, you know nothing.

Mr. Campbell: Now, that is a statement of course, but it is a form of a question. I object to it, if the Court please. It is argumentative.

The Court: Your original question was all right, but your statement following it will be stricken. He asked you whether Mr. Eddy ran the corporation.

The Witness: No.

By Mr. Greaves:

Q. Who did?

A. We all ran it. But we had our specific duties.

Q. Did you know anything about the financial aspect of this business?

A. The financial?

Q. That's right. A. No.

Q. Money? A. No, I didn't know.

Q. Who did?

A. Joe Goldstein and Mr. Eddy. Mr. Eddy was the [174] controller.

Q. What office does Mr. Eddy have in the corporation? A. Controller and secretary.

Q. What motivated you to give Mr. Eddy stock in this corporation?

A. Well, he had just helped me along, done a lot of favors for me.

Q. Favors?

Mr. Campbell: Faith, I think he said.

The Reporter: "Favors."

(Testimony of Max Goldstein.)

By Mr. Greaves:

Q. Mr. Goldstein, would it be fair of me to state at this time that you knew nothing about the details of the transaction for the San Gabriel property?

A. No, I didn't.

Q. You would say that was a fair statement?

A. Yes.

Q. I didn't hear that. A. Yes.

Q. Would you also say it was a fair statement if I were to say that Joe Goldstein and Edward Eddy knew about this transaction with the San Gabriel property?

Mr. Campbell: I will stipulate to that. I will stipulate if you want that they both knew about it. [175] Mr. Eddy has testified to it and Mr. Goldstein is the taxpayer.

Mr. Greaves: Are you objecting to my question?

Mr. Campbell: I was going to save you time.

The Court: I haven't heard any objection.

Mr. Campbell: I object to it. It calls for his conclusion as to what was in their minds and knowledge.

The Court: I think you had better establish whether he knows or not.

By Mr. Greaves:

Q. Do you know whether Mr. Joe Goldstein knew about this transaction, these transactions involving the San Gabriel property?

A. Whether I knew that he knew it, knew of it? Yes.

Q. To your knowledge did Mr. Eddy know about the transactions involving the San Gabriel property?

A. Yes.

(Testimony of Max Goldstein.)

Q. To your knowledge did any other member of the corporation know about this transaction?

A. No.

Mr. Greaves: I think that's all.

Redirect Examination

By Mr. Campbell:

Q. Let me clarify one or two things, Mr. Goldstein. [176] In the first place as to the position occupied by you and Edward back in 1953 I understand from your testimony that you did the buying of the produce, is that correct? A. Yes.

Q. And that Edward supervised, was the supervisor, is that correct? A. Yes.

Q. By that is it meant that he supervised the sale of the produce in the markets, in the stores?

A. Yes.

Q. You did the buying and he supervised the selling, is that correct? A. Yes.

Q. The buying as I understood from your testimony required that you be at the wholesale markets as early as 1:00 o'clock in the morning? A. Yes.

Q. And to remain there throughout the day, is that right?

A. Till, oh, 12:00 1:00 o'clock in the afternoon.

Q. 12:00 or 1:00 o'clock in the afternoon is when the produce market generally closes, is that correct?

A. Yes.

Q. All right. Now, you stated in response to counsel's questions that it was fair to say that Joe [177] Goldstein and Mr. Eddy knew all about these transactions, but I understood from your testimony and it is

(Testimony of Max Goldstein.)

the fact that you did discuss these various matters with Joe and with Mr. Eddy?

A. We discussed them, yes.

Q. I further understood from your testimony that the manner in which the business was conducted was that each one had his portion of the business, is that correct? A. Right. Right, yes.

Q. You yourself happened to be the produce buyer? A. Yes.

Q. I gathered from your testimony that Mr. Eddy had charge of the finances, is that correct?

A. Yes.

Q. And Mr. Joe Goldstein had general supervision over everything, is that right?

A. Yes, right.

Q. Now, is it or is it not true that you knew of the proposition to buy this San Gabriel property long before Joe and Lillian actually bought?

Mr. Greaves: Objection.

The Court: I will sustain the objection. Rephrase it.

Mr. Campbell: All right.

By Mr. Campbell: [178]

Q. How long before the purchase of the San Gabriel property or the acquisition of the San Gabriel property by Joe and Lillian Goldstein did you know about the transaction? Do you have any idea in months, days or weeks?

A. We had talked about it, and I don't know exactly how long before.

Q. Now, you have mentioned the fact that you dis-

(Testimony of Max Goldstein.)

cussed with your brothers the fact that you wanted nothing to do with anything involving Las Vegas. Was that a single discussion or did that take place over a period of time?

A. Over a period of time.

Q. Did your other brothers express themselves on that subject, too? A. Yes.

Q. And how and in what manner, what did they say about it?

A. They didn't want any part of it, either.

Q. I gather, though, Joe didn't have that feeling, is that right?

A. Well, I really don't know what feeling he had.

Q. I see. But so far as you were concerned you wanted nothing to do with it, I take it?

A. No. [179]

Q. Do you recall the time when the corporation bought the ground at San Gabriel?

A. I don't remember.

Q. Yes or no, I don't mean the date.

A. No, I don't.

Q. Do you recall the official occasion?

A. Oh, yes.

Q. You do recall the occasion? A. Yes.

Q. And do you recall how much was paid for it?

A. No, I don't.

Q. Did you know at that time?

A. No.

Q. You mean at the time you bought it you didn't know how much you were paying for it?

A. Oh, yes, but I don't recall now what it was.

(Testimony of Max Goldstein.)

Q. And I gathered from your testimony that at that time you had had some sort of information as to an appraisal, is that correct?

A. Yes, we did.

Q. Those things were in your mind back whenever it was that the property was purchased, is that right?

A. Yes.

Q. As I gather you do not recall them now?

A. No, I don't. [180]

Q. And were those matters that were discussed among the four or five of your brothers?

A. Was it discussed?

Q. Yes. A. Yes.

Q. And was it discussed with Mr. Eddy?

A. Yes.

Mr. Campbell: That's all.

The Court: Any further questions, Mr. Greaves?

Mr. Greaves: Yes, I have.

Recross-Examination

By Mr. Greaves:

Q. You knew at the time of approving your corporation's purchase of the San Gabriel property?

A. At the time, yes.

Q. How much you paid for it? A. Yes.

Q. Do you recall?

A. I don't recall how much.

Q. You paid $75,000.00 for that property. Do you recall now that amount of money?

A. No, I don't.

Q. Did Mr. Eddy tell you how much the corporation was going to pay for this property?

(Testimony of Max Goldstein.)

A. I am sure he did, but I just don't remember the [181] amount.

Q. Well, how do you remember then that you knew what the amount was?

A. Because we had discussed it.

Q. I can't hear. You will have to speak up.

A. We discussed it.

Q. What did you discuss?

A. The amount of money we paid for it.

Q. Who is "we"?

A. Mr. Eddy, I, Bunny, Eddie, Bernard.

Q. Do you remember having discussed it?

A. Discussed it, yes.

Q. But you don't remember even after I tell you the amount involved was $75,000.00?

A. No, I don't.

Mr. Greaves: That's all, your Honor.

Further Redirect Examination

By Mr. Campbell:

Q. Mr. Goldstein, I am reluctant to ask you this but I understand that since these events you have had a very severe illness, is that correct?

A. Yes.

Q. As I understand it you have had two minor strokes, is that correct? A. Yes. [182]

Q. And has that affected your memory?

A. Well, quite a bit.

Q. I see. All right, thank you, sir.

When were those suffered, Mr. Goldstein? When did you have this illness?

(Testimony of Max Goldstein.)

A. Last—the first one about six or seven years ago, and one about two years ago.

Q. About two years ago? Thank you very much.

The Court: Any further questions, Mr. Greaves?

Mr. Greaves: No.

The Court: All right, may this witness be excused, or do you want him?

Mr. Greaves: I think he may be excused, your Honor.

Mr. Campbell: You may go about your business.

Mr. Greaves: If I had known that he had had strokes I wouldn't have subpoenaed him.

The Court: We will recess for five or six minutes.

(Witness excused.)

(Short recess taken.)

Mr. Campbell: Mr. Goldstein. [183]

Whereupon

JOE GOLDSTEIN

called as a witness by and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: Would you state your name and your address, please?

The Witness: Joe Goldstein, 85 Fremont Place, Los Angeles, California.

The Clerk: Thank you.

Direct Examination

By Mr. Campbell:

Q. Mr. Goldstein, you are the Joe Goldstein who together with your wife Lillian are the petitioners in this case? A. Yes, sir.

(Testimony of Joe Goldstein.)

Q. And what is your business or occupation, Mr. Goldstein?

A. President of the Boys Markets.

Q. That is the corporation? A. Yes.

Q. Now, Mr. Goldstein, it has previously been stipulated here that during the year 1953 you were the owner of 2,720 and your wife as joint tenants the owner of 150, and your wife as trustee for your minor children the [184] owner of 5,500 outstanding shares of stock of the Boys Markets, a corporation, is that correct? A. Correct.

Q. And during the year 1953 and at all times prior thereto from the date of the activation of the corporation you had been president and a director of that corporation? A. Yes, sir.

Q. And your wife has been a director of the corporation also? A. Yes, sir.

Q. Now, Mr. Goldstein, there has been I believe stipulated here that the corporation was the successor to a limited partnership of which you were the general partner, is that correct? A. Correct.

Q. And that the corporation commenced its business on or about January 1st, 1936 at which time the assets of the co-partnership were assigned to the corporation, is that correct? A. Correct.

Q. Now, going back to that time and shortly prior thereto and during the year 1945 had the co-partnership entered into a certain lease of real property which lease has been admitted here in evidence as 2-B whereby the [185] co-partnership leased certain land in the City of San Gabriel for a period of 50 years from

(Testimony of Joe Goldstein.)

the Torley Land Company? You are familiar with that lease? A. Yes, sir.

Q. And by whom was that lease negotiated?

A. By myself with some assistance from Mr. Eddy.

Q. Yes. Incidentally, you at all times have been the chief officer and executive office of both the co-partnership and the corporation, is that correct?

A. Yes, sir.

Q. Now, at the time that the corporation was formed, I believe that lease was—I mean at the time the corporation was activated I believe that lease was assigned to the corporation, is that correct?

A. Yes.

Q. A notification of such assignment was given to Torley Land Company?

A. Yes, sir.

Q. Now, you are familiar with the terms of the lease, are you not?

A. Yes, pretty much so.

Q. And to refresh your recollection are you familiar with the provisions therein that in event of an assignment of the lease that the partnership lessee named herein should continue to be liable under the terms thereof? [186]

A. Yes, yes, sir.

Q. Now, —

Mr. Greaves: Are you referring to any particular provision in here?

Mr. Campbell: Well, I can dig it out. Provision 15, reading as follows: "The lessee may assign three-fold interest any time after date hereof in a manner

(Testimony of Joe Goldstein.)

herein set forth and not otherwise." And there are two sets of provisions. "If the lessee shall assign a threefold interest herein at any time before it shall have fully completed and paid for the initial building herein provided for of a value and in the manner herein provided for then until said building shall have been fully completed and paid for as hereinbefore set forth the lessee shall remain liable for the faithful performance of all the covenants and agreements of this lease as though no assignment had been made. In the event the lessee shall assign this lease after the completion of the aforesaid building—"

The Court: I do not think it is necessary to read all of that. It is Paragraph 15. You are familiar with it?

The Witness: I am very familiar with it, very much.

By Mr. Campbell: [187]

Q. And I refer also particularly to that portion of Paragraph 15 appearing on Page 23. I refer to the entire Paragraph 15. Now shortly after or immediately after the notification to the Torley Land Company of the assignment I will ask you if you received a letter with regard to the liability of the limited partnership under the terms of the lease, and despite the assignment. Did you receive such a letter?

A. Oh, yes.

Q. I will show you a letter dated March 28, 1946 upon the letterhead of J. Vincent Hannan, and ask you if you received that document.

A. Yes, sir.

(Testimony of Joe Goldstein.)

Q. Do you recall having received it at or about the date that it bears? A. Yes.

Mr. Campbell: This letter will be offered in evidence as Petitioners' exhibit next in order.

The Clerk: Petitioners' Exhibit No. 7 marked for identification.

Mr. Campbell: It will be offered in evidence.

The Court: Any objection?

Mr. Greaves: No objection.

The Court: Petitioners' Exhibit No. 7 will be received in evidence. [188]

(Petitioners' Exhibit No. 7 was marked for identification and received in evidence.)

By Mr. Campbell:

Q. Any time during the existence of this lease up until the time the lease was assigned to you and Mrs. Goldstein by the Torley Land Company did the Torley Land Company ever release you as a general partner or individually or the partnership of the Boys Markets from the liability under that lease?

A. No, sir.

Q. Now, with respect to the lease and with respect to that notification which you received from the Attorney for the Torley Land Company did you have any belief as to your liability under the terms of the lease?

A. Was I aware of my liability under the terms of the lease?

Q. Yes.

A. Very much so.

Q. And as to the sole general partner of a partner-

(Testimony of Joe Goldstein.)

ship no longer in existence were you aware of such liabilities? A. Yes, sir.

Q. Now, Mr. Goldstein, let me ask you this: Will you describe the method of operation of the Boys Markets, the corporation, as it existed from the time it commenced [189] doing business, January 1st, 1946 to the end of 1953; that is to say, the division of duties among the officers and stockholders?

A. I don't quite understand that question.

Q. What duties were performed by the various officers?

A. Oh, by the various officers?

Q. It is a fact, is it not, as shown by the stipulation here, that the stock was owned by you and your brothers? A. Right.

Q. All right. And that you and your brothers together with Mr. Eddy were the officers of the corporation, is that correct?

A. That's correct.

Q. Now, how were the duties divided? What duties developed upon each of you?

A. Well, Mr. Eddy had quite a bit to do with the financial end of the business, and, oh, matters of leases that were to be executed and so forth. When I got things to a certain point I would turn them over to Mr. Eddy to take care of the details and to follow through with the execution of the proposed lease or whatever the business happened to be.

And Max Goldstein, his duties were mainly in [190] produce buying, and we always felt in the trade that he was an expert at it. You have got to be pretty

(Testimony of Joe Goldstein.)

good to make any money in the produce business in Los Angeles.

Bernard Goldstein was in charge of the meat buying. Naturally some of his duties overlapped in supervision and so forth, but that also is a full time job.

Q. Did he also supervise the markets?

A. Yes, more or—yes, also he supervised it, too.

Q. All right, go ahead.

A. Then we get to Eddie Goldstein. Well, Eddie was supervising the produce departments and he was very good with personnel. He did quite a bit of the hiring, firing. And then of course he overlapped into other duties such as seeing the markets were kept as clean as they could be and different things like that. Where else have I missed?

Q. Al.

A. Oh, Al, yes. Well, Al, he was in charge of the—quite a few brothers—he was in charge of the grocery buying and his duties would overlap. He happened to have a little bit more of an education than the rest of us and could express himself a little better than Max, Eddie or I, and we called upon him to help in other things such as addressing the managers meetings and so forth.

Mr. Greaves: I can't hear these answers at all. Speak up a little bit more, if you will, please, sir. [191]

By Mr. Campbell:

Q. And what were your duties?

A. Well, my duties were mainly in finding locations. It is quite a job checking up on four brothers to see that they perform their duties. I did buying,

(Testimony of Joe Goldstein.)

everything else. I looked at the sales reports, profit and loss statements, and I could fill in on most every department in the organization, any type of buying or supervising or anything because I have done it all.

Q. Who did the hiring of the store managers?

A. What?

Q. Who did the hiring of the store managers?

A. I have done it, Al has done it. In recent years up until the time Al left, he did most of it.

Q. I see. Was there anyone assigned to the overall personnel hiring and firing?

A. I have said that Al had most of that responsibility.

Q. During that period of time? A. Yes.

Q. When did he leave the organization?

A. He left almost two years, I believe, a year and a half, two years.

Q. I see. He was never a stockholder in the corporation? A. No. [192]

Q. Now, incidentally, there has been some testimony here that your experience in the grocery business goes back to 1926?

A. I opened the first market when I was just 17 years old, in 1925. I was broke and in the board of trade when I was 18, settled for ten cents on a dollar and paid off everyone.

Q. Subsequently—

A. Subsequently, yes.

Q. And these other brothers are your younger brothers, is that right? A. Yes.

Q. Now, how did they acquire their interest in the

(Testimony of Joe Goldstein.)

business, those who now have stock in the corporation?

A. Excuse me, but by a hell of a lot of hard work. They were paid for it and acquired the stock.

Q. Will you explain that briefly when they began their association?

A. Well, Eddie Goldstein, I can remember him lifting a hundred pound sack of potatoes off a wagon with me when he weighed ten pounds less than the sack of potatoes. I remember him going to Garfield High School and he'd get out let's say at 3:00 o'clock and the high school was a good ten miles from the store, and he didn't walk, he ran all the way down. This went on for years. [193]

Q. Well, let's get down to this. A. Oh—

Q. I take it—

A. I get carried away.

Q. Pardon me. Was any of the stock given to them or did they work for the money?

A. They worked for it.

Q. They worked for it?

A. Absolutely.

Q. And something was said here about their receiving bonuses which they applied on the stock?

A. It's always been the policy of paying bonuses in the Boys Markets when the profits warranted making the payment of bonuses, and they have been paid to others than the officers, also.

Q. Bonuses were not confined to them, is that correct? A. No.

Q. Was it their choice or was it required of them

(Testimony of Joe Goldstein.)

that they put these bonuses back into the acquisition of stock?

A. That was their choice.

Q. Now at the time in 1936 when you activated the corporation and those brothers who afterwards had stock or already acquired interests, did they have an interest before [194] the corporation?

A. In the partnership?

Q. In the partnership.

A. In the partnership, let's see now. There was—yes.

Q. So that that was carried over into the corporation? A. Yes.

Q. The stock was issued, is that correct?

A. Yes, sure.

Q. All right. Now, coming again to this situation of the lease with Torley and to the—directing your attention to the transaction wherein you and Lillian Goldstein acquired the real property, do you recall when the negotiations which culminated in this particular transaction started?

A. For this particular transaction?

Q. Yes.

A. This particular phase of it?

Q. Yes.

A. Well, it's hard for me to remember exactly when, but I would say in '52 or '53, probably the end of '52, the beginning of '53.

Q. I see. The end of '52 or when—

A. Or early '53. It is hard to remember those dates. [195]

(Testimony of Joe Goldstein.)

Q. And do you recall who started the negotiations, who initiated them as far as you know?

A. I initiated them.

Q. With whom?

A. With Mr. Torley.

Q. Where?

A. It started at the bar at the Santa Anita Race Track.

Q. I see. And the race season there commences about Christmastime?

A. Yes, that's right.

Q. So it would be late in '52 or early '53?

A. Yes.

Q. All right. Now, with whom did the proposition of a trade originate, Mr. Goldstein?

A. Well, that's hard to say just whether it originated with me or Mr. Torley. I know that I had been trying to buy the property, trying and trying, and just couldn't.

Q. I see. How did this trade proposition come about then? Will you relate your meeting with Mr. Torley and what brought it about?

A. Well, one of the main reasons why you couldn't deal with the fellow was his objections to paying a high tax on the property, and so you know I guess he owned it [196] for sometime, so—

Q. I take it you gathered he had a very low base on the property?

A. Low base. And I wouldn't be surprised but what I—

(Testimony of Joe Goldstein.)

Q. No, let's not say what you would be surprised at, but what the negotiations were.

Did you discuss with him the possibility of buying the property for cash?

A. Oh, yes, yes.

Q. And what was his reaction to that?

A. No.

Q. He was not willing to sell it?

A. Not interested in selling it for cash.

Q. All right. Then what was the next proposition, and how did it come about?

A. Well, to the best of my—probably I might have suggested that maybe we could get together on a trade.

Q. All right. Then what happened?

A. Then he sort of thought that might be interesting and that he would talk it over with his son and his attorney.

Q. Yes.

A. So I told him to think it over and get in touch with me if he was interested. [197]

Q. Did he subsequently get in touch with you?

A. Yes.

Q. Now, at that time had any specific trade or had any specific property been discussed?

A. No.

Q. Or had any specific figure monetarily-wise or value-wise been discussed?

A. No.

Q. All right. It was simply the general proposition if he didn't want to sell for cash he was going to think over making a trade, is that right?

(Testimony of Joe Goldstein.)

A. That's right, yes, sir.

Q. And now how soon after that did you again hear from him, or did you approach him?

A. Well, again I can't remember whether I ran into him again and brought it up—I would have gone out of my way to do so—or whether his son called me. I don't remember.

Q. I see. But was a proposition made at that time?

A. Yes, right along, soon after that proposition was made.

Mr. Greaves: Can we pin this down?

Mr. Campbell: I am just going to try to.

By Mr. Campbell:

Q. Now, I am going to call your attention to the [198] fact that according to the minutes which have been read here it indicated that on January 27, 1953, "The president stated it might be possible to purchase the land now under lease in San Gabriel," and in the April 28th minutes it is stated that it has been decided that you and Lillian might buy the land as your private property. Now, does that assist you, those dates, in fixing approximately the time as best you can of the making of any proposition by Torley?

A. Well, I would say that in the latter part of January, late February, or early February—

Q. It would be after that first note?

A. Yes.

Q. After January 23rd?

A. Yes. And to the best of my recollection the first conversation about what kind of a deal could be made came from Ray Torley, his son.

(Testimony of Joe Goldstein.)

Q. Torley Land Company was a corporation?

A. Yes.

Q. All right. Go ahead. Where did that conversation take place, if you recall?

A. It might have been—I think it was at a small market up in—that Mr. Ray Torley operated in the town of Ontario, California.

Q. All right. Who was present at that time if you [199] recall?

A. Ray Torley and myself.

Q. And what proposition, what was said at that time?

A. Well, to the best of my recollection Ray said that J. B., that being his dad, he was J. B., was spending, was sort of retired, and was spending all of his time in Las Vegas, and he was interested in a trade if he could, and if the—if any property that he traded would be in the City of Las Vegas, Nevada. He was insisting upon that.

Q. When you say "insisting upon it," what did he say about it?

A. Well, he said, "Joe, that is the only way the old man is going to spend the rest of his days in Las Vegas and he is not interested in acquiring any more property any place else but Las Vegas, and if you can—"

Mr. Greaves: I move to strike that answer as being hearsay.

The Court: I will overrule the objection. He is leading up to this transaction.

(Testimony of Joe Goldstein.)

By Mr. Campbell:

Q. Now, was any—what was the next event that took place in regard to this transaction?

A. Well, the Las Vegas thing didn't interest me too much. I didn't particularly like it, but I remember [200] coming back and discussing it with the boys and the rest of the directors and—

Q. When you say the "boys," that's all of you. All of you are generally known—

A. Well, that's right, yes.

Q. The trade you are referring to, also, was referred to as the boys? A. Yes.

Q. And you refer to each other as the boys?

A. Yes.

Q. All right, go ahead.

A. And I know that I informed them that there was only one way that property could ever be acquired from Torley Land Company, and that was some kind of a deal that would originate and end up in Las Vegas, period.

Q. That statement was based on the information given to you by Ray Torley, is that correct?

A. Yes.

Q. Ray Torley. Do you know whether or not he was an officer of the Torley Land Company?

A. I am pretty sure he was.

Q. Yes. That fact afterward—I think the deed is here in evidence—did you have any discussions at that time with Ray Torley's father?

A. You know I think—I am not sure, but I think [201] I finally had to make a trip up there to see him.

(Testimony of Joe Goldstein.)

Q. As it developed—strike that.

Did you discuss with either of the Torleys the possibility of a trade for some of the property located at any other location?

A. Yes, on numbers of occasions long before '53 even.

Q. You had discussed that phase of it?

A. To some extent I had discussed everything with them. I had been trying to acquire the property one way or another.

Q. I gather from your statement then that you were advised that it had to be a property in Las Vegas, is that correct? A. Definitely.

Q. And discussed that fact with your brothers?

A. Yes.

Q. Is that correct?

A. Yes.

Q. And what was their reaction as directors to that?

A. Well, they didn't like the idea of getting involved in anything.

Q. . Now, will you explain incidentally, Mr. Goldstein, the family antipathy to Las Vegas? I know it is unpleasant, but will you explain that so we can understand it is just [202] not an eccentricity?

A. Well, us five boys are very close, and on occasions the five of us have gone up there without our wives, just wish we hadn't have gone. It was a long trip home. We lost a little more money than it was wise to lose, not any more than we could stand, but it was a long trip home. We just had too much of a ball.

(Testimony of Joe Goldstein.)

We know a lot of people in Las Vegas, and as it happens a couple of my brothers would rather shoot dice than east, if given the opportunity, and opportunities in Vegas are there, and they enjoy a good reputation, and they have a bad habit in Las Vegas of extending credit, and they thought it would be a good idea for us just not to have anything to do with it, period, including yours truly Joe Goldstein.

Q. And had that been an agreement among the members of the family?

A. I don't quite understand.

Q. Had you all agreed among yourselves that you would have nothing to do with Las Vegas?

A. To the best of our ability.

Q. I see. All right. Now, as I understand it from what you say your brothers when you explained that this deal had to be in Las Vegas wanted no part of it, is that correct?

A. That is right.

Q. At that time had you had discussions with anyone [203] on the Torley side to determine what would be involved in acquiring the Las Vegas property?

A. What would be involved?

Q. Yes, sir.

A. Well, knowing Mr. Torley as well as I do I didn't know what would happen, and a lot of things could be—

Q. No, I mean how much money would be involved originally? A. Well,—

Q. That is to say, had you discussed whether or not the apartment house and the land was to cost $5.00 or $500,000.00?

(Testimony of Joe Goldstein.)

A. Now listen, I had to have this pretty bad, and this little old horse trader was hard to talk figures, he just didn't discuss too much. All I knew was that we wanted—I wanted that property—and I was afraid to throw any figures around arousing his suspicions. And on past deals he has reneged at least twice on deals that were made. I had to be very cautious.

Q. All right. Then at the time you discussed the matter with your brothers I take it you did not know, no price had been arrived at for the acquisition of the apartment, is that correct?

A. No. I had ideas in my mind, but I didn't know what was going to happen. [204]

Q. So I take it you did not discuss $35,000.00 or any other figure with your brothers?

A. I can't remember discussing that because we might have thrown a figure around. We had a lot of ammunition. The fellow was only getting $800.00 a year, and even after I made the deal with him I felt sorry for him and tried to talk him out of it. So we know with a return of $800.00 what the heck you have got to have invested. So I was going to buy within that range of income. Now, I didn't know what would happen.

Mr. Greaves: I have gotten lost, your Honor, between the question and the answer. I think the question was directed to a discussion with the brothers, and the answer was involved with a discussion with Mr. Torley. Is that correct?

Mr. Campbell: No, I am sitting here enjoying the answer myself.

(Testimony of Joe Goldstein.)

The Court: Well, he started out answering the question "No, there wasn't any particular figure," and then it was just more or less an explanation.

Mr. Campbell: Why there wasn't.

The Court: What the situation was.

The Witness: Couldn't have a figure, it was impossible.

Mr. Campbell: Your Honor was about to say something. [205]

The Court: No, I have finished.

By Mr. Campbell:

Q. Now, when was it in connection with the deal that you made with Torley that a figure was first arrived at?

A. Well, that would have been after I talked to him in Las Vegas because I—

Q. Would that be before or after you had discussed the matter with your brothers when Las Vegas came into it and they wanted nothing to do with it?

A. That would have been—let's see—would that have been afterward? When the price was arrived at it probably was after I had talked to my brothers, probably.

Q. That you finally arrived at a price?

A. Yes.

Q. Did you ever advise your brothers of the price? Did you ever tell them about it?

A. Oh, I suppose so.

Q. Did you make it any particular secret?

A. No, I didn't make no secret, nor did I—I don't think I made much of an effort to tell them what it was.

(Testimony of Joe Goldstein.)

Q. I see. All right. Now you say you went up to Las Vegas and met with Mr. Torley?

A. Yes. [206]

Q. After meeting with Mr. Torley I gather you entered into the escrows by which this deal was accomplished, is that correct?

A. Well, I met with him, and then I engaged a real estate agent up there and gave him an idea of the problem here, and then—

Q. What was your arrangement with Mr. Torley at that time with the Torley Corporation?

A. Well, if they could find a suitable piece of property that they would—that he would be willing to trade for his fee for, he would make a deal. And it was my business to see that he didn't find one that was too high-priced where we'd have a problem.

Q. And was the type of property specified?

A. Apartment house, residential income type of thing.

Q. Was it to be with any specification made in these preliminary negotiations as to whether it was to be a new apartment house or one that was already built?

A. As it ended up—

Q. No, I know how it ended up.

A. Oh, at one time there was—yes, I remember now at one time he was interested in a—oh, yes, he was interested in an older house, and this is what I wanted him to get interested in because I didn't—I didn't like the [207] idea of getting involved in building one because I was dealing with a pretty nice sharp dealer.

(Testimony of Joe Goldstein.)

He's all right. I have a lot of respect for his ability to deal.

Q. Who was it who finally picked out the lot that was used?

A. Oh, he must have. He did.

Q. Your man didn't find the lot?

A. I can't make sure. I just don't remember.

Q. I see. But at least a lot was ultimately decided upon, is that correct?

A. Mr. Torley must have found it himself.

Q. And who was it that fixed the price that was to be spent for an apartment house to be built on that property? A. He and I did.

Q. By discussion?

A. Yes.

Q. Was that before or after an architect or builder had been interviewed? A. Before.

Q. And what was the price that you agreed upon?

A. It was in the thirty thousands, thirty-four thousand, thirty-five thousand, something like that.

Q. For the over-all, is that correct?

A. Yes, that was to be the total cost. [208]

Q. Who picked the contractor who was to build upon the property? A. Mr. Torley.

Q. Now, as a result of those negotiations did you enter escrow agreements? I believe those have been marked, have they not, for identification, three escrow agreements clipped together.

The Court: Were they an exhibit attached to the stipulation?

Mr. Campbell: No, no, your Honor.

(Testimony of Joe Goldstein.)

The Court: I do not believe they have been presented yet.

Mr. Campbell: I gave them to the Clerk to mark this morning. Well, I will use the photostats.

By Mr. Campbell:

Q. I show you three documents each of which are labeled escrow instructions, being escrow instructions with the First National Bank of Ontario, California, being escrow Nos. E13965, 66, and 67, and ask you if you recognize these as the three escrows opened at that institution between yourself and Lillian Goldstein on the one hand and the Torley Land Company on the other?

A. Yes.

Q. And are those the three escrows that were involved in that transaction? [209]

A. Yes, sir.

Mr. Campbell: I will offer these under one number, if the Court please.

The Clerk: Petitioners' Exhibit No. 8 marked for identification.

Mr. Campbell: I will offer them in evidence.

The Court: Any objection?

Mr. Greaves: No objection, but I would suggest that it might be easier to identify these exhibits if they were either marked separately or supplemented somehow. The fact that they all have separate differential numbers appearing in the right-hand corner—

Mr. Campbell: I have no objection to that except they all relate actually to the same transaction, but it is customary in a trade transaction to have one escrow by which the real property in Las Vegas was pur-

(Testimony of Joe Goldstein.)

chased, one under which the apartment house was constructed, and then the trade was consummated in the third escrow.

The Court: Now does each one of those have a different number on them?

Mr. Campbell: Each one has a different number.

The Court: I think that is sufficient identification. They can be referred to by that number.

All right, Petitioners' Exhibit No. 8 will be received in evidence. [210]

(Petitioners' Exhibit No. 8 was marked for identification and received in evidence.)

By Mr. Campbell:

Q. Now, in connection with the acquisition of the Las Vegas property and the erection of the apartment house as set forth in those instructions, how much did you expend, Mr. Goldstein? What did it cost you?

A. $35,000.00 approximately.

Q. And was that your own and your wife's money that was used in that regard? A. Yes, sir.

Q. It was not money belonging to the corporation? A. No, sir.

Q. Nor borrowed from the corporation?

A. No, sir.

Q. And entering into that transaction did you intend to accept for yourself any risks which might be involved therein? A. Did I intend—

Q. Were you taking any risks that were involved?

A. Oh, yes, sure.

Q. What I mean to say is that you had no assurance from your corporation or from anyone else that if

(Testimony of Joe Goldstein.)

there was a loss resulting that they would make it good, did you? A. That's right. [211]

Q. You had no such assurance?

A. I had no assurance of that.

Q. Now, prior to entering into this transaction, are you able to state definitely that your brothers in the corporation and Mr. Eddy having been informed of the proposed trade declined it on behalf of the corporation?

A. Yes, they had declined it on behalf of the corporation.

Q. Now, subsequently—

Mr. Greaves: May I request the Court ask counsel to be a little less leading in his questions?

Mr. Campbell: Very well. I am sorry. The hour is getting late and I am getting run down.

The Court: Try not to put words in the witness' mouth.

Mr. Campbell: I will try not to.

By Mr. Campbell:

Q. Now, in connection with that transaction and at the close of the escrow, what did you and Mrs. Goldstein receive, what did you get?

A. Well, we got title to the property after the close of the escrow.

Q. You got a deed to the property?

A. We got a deed to the property.

Q. And together with that did you receive a policy [212] of title insurance which has been placed here in evidence? A. Oh, yes.

Q. Which recites that the title is subject to the lease to the Boys Markets, is that correct?

(Testimony of Joe Goldstein.)

A. Yes, that's right.

Q. Now, in connection with those escrows did you receive an assignment of that lease from the Torley Land Company to you and Mrs. Goldstein?

A. Yes.

Q. Mr. Goldstein, what then having received title to the property and according to the policy of title insurance, the policy vested in you on December 28, 1953, what did you then do with the property, with the title of the property? A. We didn't do anything.

Q. Did you subsequently sell it?

A. Oh, we eventually sold it, yes.

Q. When? A. In late December.

Q. And to whom? A. To the Boys Markets.

Q. And for what price? A. $75,000.00.

Q. Now in that connection and prior to the purchase by the Boys Markets was discussion had among the stockholders, [213] other stockholders and yourself? A. Yes.

Q. Your other directors? A. Yes, sir.

Q. And at that time did you consider $75,000.00 to be a fair price for that property? A. Yes, sir.

Q. To your knowledge was some independent investigation undertaken by Mr. Eddy for the purpose of ascertaining the fair value of that property?

A. Yes, sir.

Q. And if you know of what did the investigation consist?

A. It consisted of contacting the Bank of America and finding out what would be a fair price for the Boys Markets to pay for the property for me to sell it.

(Testimony of Joe Goldstein.)

Q. And subsequent to that transaction, Mr. Goldstein, do you recall the fact that the Revenue Agent made some investigation relative to various affairs of the corporation referring to a Mr. Goodman?

A. What?

Q. Do you remember the fact that Mr. Goodman—of Mr. Goodman's investigation in that case?

A. Yes, I remember.

Q. Did Mr. Goodman or did anyone else during the [214] course of that investigation discuss with you the circumstances of the purchase of this property by you and the sale of it to the corporation?

A. Not to the best of my recollection, no, not at all.

Q. When was the first time—what was the first occasion you learned that the transaction was questioned in any manner with respect to its tax effect?

A. I believe when I was billed for it.

Q. When you received the Revenue Agent's report?

A. Yes.

Q. And the proposed assessment, is that correct?

A. Yes, sir.

Q. To your knowledge was it discussed either at that time or subsequently either with yourself or with any of the other officers or directors?

A. You mean up to—

Q. Did any Government Agent ever up to this time?

A. No.

Q. Question you about it? A. No.

Q. Or seek to question you about it?

A. No.

(Testimony of Joe Goldstein.)

Q. Or did you ever avoid being questioned about it? A. No, sir. [215]

Q. Or did they ever question your wife, Lillian Goldstein? A. No, sir.

Q. These were, I take it, community funds used in the transaction? A. Yes, sir.

Q. Calling your attention to the fact that the escrow was opened on June 22nd and was not completed until December 8th, was the apartment house being constructed during that period? A. Yes, sir.

Q. Will you state—do you recall whether or not it was required that the apartment house be approved by the Torleys before the close of the escrow?

A. I don't remember that, sir.

Q. You don't recall, all right. Now, at the time that you entered into this transaction, although your brothers had expressed according to you the—and according to Mr. Eddy and according to them—they did not desire to enter the deal, why was it that you subsequently went ahead with the deal, Mr. Goldstein?

A. Well, about that time I was beginning to set up my estate, my wife was being concerned about taxes, death duties, and so forth, and I was advised that I had a liability there that I ought to try to get rid of. [216]

Q. Do you recall who gave you that advice?

A. Oh, gosh, that has been given to me by three or four different people.

Q. I see.

A. Individuals connected with the State Department, the bank, an attorney, and the last—

(Testimony of Joe Goldstein.)

Q. They advised you what?

A. They advised me that in case I was to die my estate also would be liable for the lease there at the San Gabriel property.

Q. What other reasons did you have? I gather you thought it was a good deal.

A. Well, it was a good deal. It was a deal. It was something we ought to just do. It is just unfortunate that it had to be in Las Vegas. It was not of my choosing or my brothers.

Q. Was there any intention upon your part at the time and before you entered into these escrows that you would not permit the corporation to have the deal but that you were going to take the deal yourself. In other words, possibly I haven't put that well, but did you ever have any intention before, at the time you offered it to the corporation, were you willing that they enter the deal?

A. Well, I was willing for them to get into the deal originally. [217]

Q. Yes, that's what I mean.

A. Originally. Then when they didn't want to I still was going to have that deal because I knew I could get a much, much better deal with either the Boys Markets Corporation or somebody else, so I went ahead with the deal.

Q. But originally so far as you were concerned in good faith you were willing that the corporation have the deal?

A. Yes.

Q. Is that correct? A. Yes.

(Testimony of Joe Goldstein.)

Q. Now, were other objections other than the matter of Las Vegas raised at that time in behalf of the corporation?

A. Yes, there was. Mr. Eddy was very concerned about the negative covenants and so forth in our loan agreement that we have with Provident Mutual. And he was concerned about what our relationship would be with the Provident Mutual if that ever came to light. And I have remembered since today that we were having some other difficulties relating to interstate trade. I had forgotten about that, until today, that was over labor matters or something.

Q. By "negative covenants," I assume you are referring to the provisions in the agreements that the borrowing corporation shall not enter into certain types of [218] transactions.

A. Yes.

Q. Without consent? A. Right.

Q. And in that connection I am going to show you a document entitled "Note Agreement." This does not purport to be the signed original but a copy thereof, an agreement dated October 1st, 1950, between the Boys Markets, Inc., a California corporation, as borrower, and Provident Mutual Life Insurance Company of Philadelphia, as lender, and ask you if this is a copy of the existing agreement at that time including the modifications. There are some modifications indicated here which were made subsequent to 1955, but is this the agreement to which he referred?

A. Excuse me.

Q. I show you this note agreement as I have in-

(Testimony of Joe Goldstein.)

dicated and ask you if that is a note agreement to which you refer?

A. Yes, sir.

Q. And this has been produced from the files and records of the Boys Markets Corporation?

A. Yes, sir.

Q. And kept and maintained in the course of the business of that corporation? A. Yes, sir. [219]

Q. And was in effect as of the date throughout the year 1953, is that correct?

A. Oh, yes, yes, sir.

Mr. Campbell: I will ask that this be marked for identification. I will read a pertinent portion from it into the record rather than encumbering the record with the entire document.

The Clerk: Petitioners' Exhibit—

Mr. Greaves: I wonder if we might get this part photostated for the record and submit the document at this time with permission to withdraw it to photostat the significant part.

The Court: How much of it do you want to get into the record?

Mr. Campbell: It is part of one page and part of another.

Mr. Greaves: I have not seen this document at all, your Honor. I don't know what it encompasses. I would like to have a chance to see whether this is being read into the record in the entirety or whether this is a subclause or just what it is.

The Court: I think it would be better to introduce the document in evidence and if necessary withdraw the original.

(Testimony of Joe Goldstein.)

By Mr. Campbell: [220]

Q. This is not in effect now, is it, Mr. Goldstein?

A. Yes, I think this is the last year, 1960. It is still in effect, yes.

Q. This is not the signed original copy. Is there any harm to the operation of the company if this document is gone for a period of time?

A. Well, I would rather it wouldn't be gone.

Q. It might interfere with your operation?

A. It could possibly.

Q. All right.

Mr. Campbell: How close are we to adjournment this afternoon?

The Court: Well, I would like to continue if we can. Are you about finished with Mr. Goldstein?

Mr. Campbell: Well, fairly close. I was going to say I would submit this and let the Government counsel take it with him over the evening recess and possibly we could come to an agreement as to the pertinent portions.

The Court: Well, I would suggest that you have the document itself marked and you tender it, you offer it in evidence, and rather than reading it now if we don't finish tonight, why counsel can take it with him and possibly you can stipulate the parts that you want to get in.

The Clerk: Petitioners' Exhibit 9 marked for identification. [221]

(Petitioners' Exhibit No. 9 was marked for identification.)

(Testimony of Joe Goldstein.)

The Court: Now, do you want to ask questions about that right now?

Mr. Campbell: No, I am just calling his attention to a particular clause which I will identify and then counsel can find that clause during the course of his reading.

Mr. Greaves: Mr. Clerk, what was that?

The Clerk: That was Petitioners' No. 9, marked for identification, counsel.

By Mr. Campbell:

Q. Now, I am directing your attention to Paragraph No. 6 headed "Negative Covenants of the Company," and I am particularly referring to the covenant in Subdivision 5 herein, commencing on Page 9. Now you stated, I believe, that Mr. Eddy raised the question under the covenants of that agreement whether you could legally enter such a transaction, is that correct?

A. That's right, and we all were very much concerned in being sure that we did nothing that raised any questions regarding this agreement.

Q. What was the outstanding amount of the loan approximately at that time?

A. Well, at that time it would have been—'53—
[222] $250,000.00 to $275,000.00. $275,000.00.

Q. So that the agreement was in full force and effect so far as its terms were concerned?

A. Yes, sir.

Q. You also mentioned the fact that there was raised the question of whether the construction of such

(Testimony of Joe Goldstein.)

an apartment house would constitute doing business in another state. Who raised that question?

A. Mr. Eddy.

Q. And what was said in that regard among the officers?

A. Well, it's kind of hard to remember just what was said, he did think that it might be just—it might not be doing the right thing, we might be in conflict with this agreement with Provident plus the fact that—

Q. Wait a minute. Conflict with this agreement, you say?

A. With this agreement with Provident.

Q. As to the interstate—

A. That is what I was getting to, and it's awfully hard for me to remember the details but we were about to become involved in some sort of labor matters where the interstate problem was a definite important issue. I don't remember whether it was us alone involved or part of our industry together, a group of us, I can't quite remember. [223] That was raised by Mr. Eddy and he was very much concerned about it.

Q. You have an industry group here? A. Yes.

Q. Composed of all of the large—

A. Leading supermarkets.

Q. Large chain store supermarkets, is that correct? A. Yes.

Q. Were those factors that were considered at that time as to whether or not the corporation should buy the property?

A. Yes, very much so.

Q. Were these matters there that you say were

(Testimony of Joe Goldstein.)

raised by Mr. Eddy to your knowledge explained and discussed to the best of their understanding with the other officers and directors? Did you discuss this with your brothers?

A. Oh, sure. It was discussed with them. How much of it they understood I don't know.

Q. But you are positive that it was discussed?

A. Positive.

Q. Let me ask you this, Mr. Goldstein. Would you intentionally do an act to their detriment and solely for your benefit?

A. I should say not.

Q. I mean you have a close family relationship, [224] is that correct?

A. Very close. To the contrary, you know it is very close. I wouldn't do—I never done—as the record bears out that I have never done anything to hurt them in any way financially or otherwise.

Mr. Greaves: Would you speak up?

The Witness: It must be my throat. I am hollering. I am getting a little worried I might not make it tomorrow. Excuse me.

By Mr. Campbell:

Q. And you are positive that these matters were all discussed in the office there with them before any steps were taken?

A. Oh, yes, definitely.

Mr. Campbell: You may cross-examine.

The Court: Just a moment. Is this your last witness or do you have more witnesses to go?

(Testimony of Joe Goldstein.)

Mr. Campbell: I want to review my notes and I think probably he will be the last witness I will call.

The Court: Well, I guess we will recess until 9:30 tomorrow morning.

(Whereupon, at 4:45 o'clock, p.m., the hearing in the above-entitled matter was adjourned until Friday, January 22, 1960, at 9:30 o'clock, a.m.)

[225]

* * * * *

Los Angeles, California, Friday, January 22, 1960.

* * * * *

The Court: We will resume trial of the Goldstein case.

Mr. Greaves: Before we commence, your Honor, may the record show that of the witnesses subpoenaed by the respondent in this case Mr. Torley is present in court at this time; that Mr. Al Goldstein is on half-hour call; that Mr. Ed Goldstein has been excused until approximately 10:00 o'clock this morning due to a medical consultation he had scheduled, and Mr. Bernard Goldstein is not present. He was informed, of my knowledge, to be present at 9:30 this morning. As for Mrs. Goldstein, I don't know where she is, Mrs. Lillian Goldstein. I don't know where she is this morning, either.

Mr. Campbell: I thought we had had the understanding and agreement that, in view of the illness of the children, that she need not appear.

The Court: How are the children?

Mr. Goldstein: The children are still in bed, but I thought when I left here last night—

(Testimony of Joe Goldstein.)

Mr. Greaves: May I ask the age of these children?

Mr. Goldstein: The children are 8 and 13.

Mr. Greaves: Well, I believe, your Honor, under the circumstances she should probably be excused [228] from this case.

The Court: All right. You will not insist on having her as a witness?

Mr. Greaves: No, your Honor.

The Court: All right. If you want to release her from the subpoena at this time, that will be understood.

Do you know where your brother Bernard is?

Mr. Goldstein: Oh, Mr.—knows where he is at.

Mr. Campbell: Mr. Greaves?

Mr. Goldstein: Greaves. You talked to Bernard and you told him that he should be here by about 10:30, because he has a doctor's appointment.

Mr. Greaves: What about Edward?

Mr. Goldstein: Edward, you said, could be here around 10:00.

Mr. Greaves: I will stand corrected on that, your Honor.

The Court: What about Albert?

Mr. Greaves: Albert is on half-hour call. I wasn't sure which brother was which.

Mr. Campbell: And one brother was released from further appearance.

If the Court please, there is one matter I would like to cover on direct examination, which I did not cover yesterday. [229]

The Court: All right. You may continue.

Mr. Campbell: It won't take a moment.

Whereupon

JOE GOLDSTEIN,

was called as a witness on behalf of the Petitioners and having been previously duly sworn, testified further as follows:

Direct Examination—Continued

By Mr. Campbell:

Q. Mr. Goldstein, in your testimony yesterday you related that in connection with the exchange which you effected of the Las Vegas property for the San Gabriel property, as a part of that transaction, you caused to be built under the terms of your agreement with Torley an apartment house on the Las Vegas property, is that correct? A. Correct.

The Court: May I interrupt?

Sir, are you a witness in this case?

Voice: Yes, sir.

The Court: I think that we had a separation of witnesses, and you better step back in this back room.

Are there any other witnesses in the case?

Mr. Campbell: That is the unfortunate vice of separation of witnesses.

By Mr. Campbell: [230]

Q. I believe you testified that you expended of your own funds the sum of $28,000.00 for the erection of the apartment house, is that correct? A. Right.

Q. And $7,000.00 for the purchase of the lot?

A. Approximately.

Q. In that connection did you and your wife, the petitioners, enter into a contract with a builder, John

(Testimony of Joe Goldstein.)

Law, of Las Vegas, Nevada for the erection of that apartment house? A. Yes.

Q. I show you a document consisting of four pages and ask if that is your copy of the contract which you and your wife entered into for the purpose of completing that deal? A. Yes.

Q. I observe that this particular copy is signed and acknowledged by the contractor, and I presume that it is a fact, is it not, that the copy delivered to the contractor was signed by you and your wife?

A. I imagine so, must have been.

Mr. Campbell: This will be offered in evidence as Petitioners' next in order.

The Clerk: Petitioners' 10 marked for identification.

(Petitioners' Exhibit No. 10 was marked for identification.) [231]

Mr. Greaves: Do you have a copy of that?

Mr. Campbell: I don't. May that be withdrawn at the conclusion of trial for the purpose of photostating in order that the Government may have a copy of it?

The Court: Yes. Have you any objections to the admission?

Mr. Greaves: I haven't seen the document, your Honor.

No objection.

The Court: Petitioners' Exhibit 10 will be received in evidence.

(Petitioners' Exhibit No. 10 was received in evidence.)

The Court: Permission will be granted to withdraw the exhibit for the purposes of photostating, and then

(Testimony of Joe Goldstein.)

the exhibit that has been marked will be returned to the file.

Mr. Campbell: Yes. That is the matter I had in mind.

You may cross-examine.

Mr. Greaves: Just a moment, please, your Honor.

The Court: Yes.

Cross-Examination

By Mr. Greaves:

Q. First, may we go into a little background of the [232] Boys Markets, Incorporated? A. Yes.

Q. In what year did you say you started your first market business? A. 1925.

Q. You were age 17? A. Right.

Q. What happened to this business?

Mr. Campbell: If the Court please, I only make one objection. If the Court is going to open it, I will not make further objection. But I object that this is immaterial and remote and has no bearing upon the issues of this case.

The Court: It seems to me it is rather remote, too. I believe you asked the same question. I believe he stated yesterday that the same facts that Mr. Greaves apparently is about to question him on. So I will overrule the objection, although I don't see it is going to give a great deal of benefit to the determination of these issues, but you may proceed.

The Witness: What do you mean?

By Mr. Greaves:

Q. Did you state that this business went into bankruptcy?

(Testimony of Joe Goldstein.)

A. This business almost went into bankruptcy, about [233] the time I was 18, but not being a believer in bankruptcy I was able to survive, and on assignment we paid off; we settled for ten cents on the dollar, and over a period of years I was able to pay off a hundred cents on the dollar, and we are still in business 35 years later. I am 52 now.

Q. I didn't hear that.

A. I am 52 now, 35 years later.

Q. Was this business a sole proprietorship?

A. Well, I started it, yes. At that time I didn't know what a sole proprietorship meant.

Q. In retrospect? A. I would say so.

Q. When did the Boys Markets commence operations as a limited partnership?

A. I can't remember the exact—

Q. The approximate date will be fine.

A. 1936, something like that.

Q. What happened to the sole proprietorship?

A. Oh, it just became a partnership. I sold some of my interest to my brothers and took them in as partners.

Q. Do you recall just generally, not specifically, the source of assets with which the limited partnership started its business? A. The source of assets?

Q. Yes. [234]

A. Well, money that different ones of us had in the bank—if we go back to '36 you might bear in mind that it took very little money. In those days we worked mostly on our reputation and credit, and the dollar

(Testimony of Joe Goldstein.)

bought an awful lot of merchandise. So it didn't take much money.

Q. Who were the partners in the limited partnership? A. Albert Goldstein.

Q. I'm sorry, I can't hear you.

A. Eddie Goldstein, Bernard Goldstein, Albert Goldstein, and Max Goldstein, too, I believe.

Q. And yourself? A. Oh, yes.

Q. Each of these individuals contributed assets to the corporation? A. Of course.

Q. Cash or— A. Yes.

Q. Part of these assets were assets that they purchased from you? A. Yes.

Q. Who determined that this would become a limited partnership? A. Oh,—

Q. You were operating as a sole proprietorship?

A. Yes. [235]

Q. So you determined it would become a limited partnership, Boys Markets?

A. I suppose so, talked it over with the boys, and we decided that was the proper time and proper thing to do at that time.

Q. By the "boys," you refer to your brothers?

A. Yes.

Q. All four of you?

A. You know, there was a period there when Max Goldstein was not with us, and I can't remember if he came in the original partnership.

Q. Can you give the Court an approximate date at which time you and your four brothers were partners in this limited partnership, 1939?

(Testimony of Joe Goldstein.)

A. Well, I would say by 1940—that would be all right, I believe.

Q. Are you familiar with the lease that was executed between your limited partnership and the Torley Land Company in September of 1945?

A. I know the important points about the lease, yes.

Q. Are you also familiar with the assignment of this lease to the Boys Markets, Inc.? A. Yes.

Q. The document that exhibits this assignment—

A. I will the minute I see it. [236]

Q. I now place before you, Mr. Goldstein, Joint Exhibit 2-B in this case, which has been admitted into evidence as a lease executed September 27, 1945 between the Torley Land Company as lessor and the Boys Markets, a limited partnership, consisting of Joe Goldstein, general partner, and Edward Goldstein, and Joe Goldstein, as trustee for Max Goldstein, limited partners, as the lessee, is that correct, sir?

A. I believe it is, yes.

Q. I now show you Joint Exhibit 3-C, which has been admitted into evidence in this case, as the assignment of the aforementioned lease from the Boys Markets, the limited partnership, made up of the partners Joe Goldstein, general partner, and Edward Goldstein, and Joe Goldstein as trustee for Max Goldstein, limited partners; this assignment being from the Boys Markets, the limited partnership, to the Boys Markets, Inc.?

A. Yes.

Q. I wonder if you could explain to the Court why these documents only state that the partners of this

(Testimony of Joe Goldstein.)

corporation were yourself, your brother Edward, and yourself again as a limited partner, trustee for Max Goldstein?

Mr. Campbell: Pardon me. I thought you misstated the question. You said the partners of this corporation.

Mr. Greaves: Partners of the limited partnership. [237] Thank you.

The Witness: And what is it you wish to know? By Mr. Greaves:

Q. Can you explain why these instruments recite that the limited partnership was made up only of yourself and your brother Edward?

A. Yes. Apparently, they were the partners in that year at that time.

Q. Apparently?

A. They were, when it—it would have stated.

Q. What happened to the partnership interests of the other brothers?

A. Normally, that's very easy. They sold their interests in the meantime.

Q. To whom? A. To me.

Q. Do you recall when?

A. I can't recall exactly when, what year, but surely between some—

Q. Between 1940 and '45?

A. 1939 or '40, '44, '45, something like that; kind of hard to remember exactly.

Mr. Campbell: If the Court please, I don't understand the issue. It was stipulated—

The Court: I would like to suggest that if [238] counsel want to address the Court, will you please stand?

(Testimony of Joe Goldstein.)

Mr. Campbell: I beg the Court's pardon.

The Court: Now go ahead.

Mr. Campbell: I wish to suggest to the Court that the stipulation entered into by the parties here and the Revenue Agent's report both show that the partnership at this particular time consisted of these people who were on these documents. Therefore, this question is incompetent in that it is as to a matter which has been stipulated and agreed to.

The Court: Well, I fail to see how the changes in the partnership have any bearing whatsoever on this. But the respondent seems to have some idea that they will have, and I would rather receive the evidence.

Mr. Greaves: May I be heard on this point just to this respect: That Paragraph 6 (a), Sub 1 of the petition filed in this case, stated that this limited partnership was made up of or consisted of Joe Goldstein, general partner, Edward Goldstein, and Joe Goldstein, as trustee for Max Goldstein, as limited partners. That evidence has been introduced in this case by petitioner to the effect that all the brothers were partners of the corporation; and that the purpose of this question is to determine whether in fact all the brothers were partners in this partnership; and these questions are directed to [239] determine whether in fact there was a time when all these brothers were partners in this limited partnership; and this, to establish control of petitioner, not only of the sole proprietorship, but of the limited partnership, then of the corporation.

Mr. Campbell: If the Court please, the allegation in the petition on Page 3 is that on or about the 27th

(Testimony of Joe Goldstein.)

day of September, 1945 the Boys Markets, a limited co-partnership, consisting of the petitioner Joe Goldstein, as general partner, and Edward Goldstein, and so forth.

The stipulation on Paragraph 5, that on and prior to September 27, 1945 the petitioner Joe Goldstein was the sole general partner in the limited co-partnership, consisting of himself as co-partner and Edward and Joe Goldstein, as trustee for Max Goldstein, limited partners. I submit there is no issue.

The Court: Yes. The petition certainly alleges the partnership consists of those partners as of a certain date.

Mr. Greaves: As I say, your Honor, we are trying to determine—

The Court: Can you enlighten me further what effect any changes in the partnership may have on respondent's claim with regard to this particular income?

Mr. Greaves: Yes, sir. I want to show that this [240] individual had control not only of the sole proprietorship until '36 or thereabouts, when he went into business as a limited partnership, but that he also had control of the financial fortunes of the limited partnership, which was succeeded by a corporation, in which he is the majority stockholder, president chairman of the board, which he also controls, which corporation he sold the subject property to.

The Court: How do you claim that who controlled the partnership has any bearing on who controlled the corporation?

Mr. Greaves: If the Court would indulge—

(Testimony of Joe Goldstein.)

The Court: And, further, he apparently was acting in behalf of the corporation when this transaction took place.

Mr. Greaves: The corporation was the successor of the limited partnership, which was the successor of the sole proprietorship.

The Court: Yes, I understand that.

Mr. Greaves: And the respondent believes at this time that it can develop such facts that will show a control that originated in Joe Goldstein and continued in him through all these business forms, if you will indulge respondent for a few more moments.

The Court: I will do so. Proceed.

By Mr. Greaves: [241]

Q. Then it is your testimony that your brothers, other than Edward, sold their partnership interest to you? A. What brothers?—

Q. Brothers Albert, Bernard, Max,—

A. Albert, Bernard and Max?

Q. Yes.

A. You say that Max sold his interest?

Q. I am asking you if that was your testimony, sir. A. Not Max, I don't believe.

Q. Did Al and— A. Yes.

Q. They sold their partnership interest to you?

A. Yes.

Q. With respect to Max, what happened to his partnership interest?

A. Well, I'd have to go back and look at some records.

(Testimony of Joe Goldstein.)

Q. I am just asking you for your recollection at this time.

A. I can't recollect exactly what happened.

Q. Weren't you in fact a trustee, a limited partner?

A. Yes, definitely.

Q. Do you recall why you became a trustee for Max Goldstein?

A. Yes, I do. If I have to answer that, I would be [242] glad to, but it will take quite a long time.

Q. You can't do it briefly?

A. No. You can't answer personal family problems briefly.

Q. All right. There were personal family problems that led to your becoming a trustee for Max Goldstein? A. Yes.

Q. What year? A. I can't recall.

Q. By 1945? A. Before then, I think.

Q. Who determined that you should become the trustee, rather than Edward?

A. Who determined that I should become a trustee?

Q. The trustee for Max Goldstein, rather than your brother Edward?

A. I would say that Max determined that.

Q. You were the only general partner in this partnership, is that not correct?

A. Yes.

Q. In what capacity did you serve the partnership?

A. Oh, I did a little of a lot of things in the market business. We have the produce department. We have the meat department, the delicatessen department, the liquor department. [243]

(Testimony of Joe Goldstein.)

Q. Weren't you in fact the general manager of the limited partnership?

A. General manager? Oh, no.

Q. Didn't you so testify on direct examination?

A. I didn't finish the answer. You can be a general manager, but I would have an awful lot of assistant general managers.

Q. I believe that your answer is not responsive. I asked you whether or not you were the general manager. I didn't ask you whether you had assistant managers.

A. Well, general manager, you could use that term, yes.

Q. What term would you use?

A. What?

Q. I am asking for your term, what term would you use? A. This was in what years?

Q. Well, from the year the limited partnership commenced operations until it ceased operations, from 1936 or thereabouts to 1946.

A. Well, we were a smaller company at that time, and our business is a very competitive business, and we just don't line out specific duties for each one to do in the market business. You got to be on your toes, working hours and hours a day to stay in business and show a profit. I [244] can't say that there was any specific—if I only had certain duties to do, or any of my brothers, we wouldn't be looking forward to a better than a forty-five million dollar-volume next year, and we wouldn't have a AAA credit rating in Dun &

(Testimony of Joe Goldstein.)

Bradstreet, which we are one of the very few in our business that has.

But it take a hell of a lot of work, Mr. Greaves. It is not a Standard Oil Company or Union Bank or Bank of America, where there is certain people doing certain limited things.

Q. You are president of the Boys Markets, Incorporated, are you not? A. Yes, sir.

Q. Was there a comparable position in the Boys Markets, the limited partnership?

A. Well, we got a little fancier as we became a corporation.

Q. Is it your testimony at this time that you were not the general manager of the limited partnership?

A. I didn't say that.

Q. Would you say you were?

A. What does general manager actually mean?

Q. A man who ran the outfit, who coordinated the activity of the outfit.

A. Coordinated, but you said "ran it." I didn't run [245] it; I did coordinate. I wasn't sure that I knew what you meant by that. I must have been the general manager. Yes, I was the coordinator and general manager.

Q. In this capacity were you familiar with the respective partnership interests of the individuals who were partners? A. Yes.

Q. Calling your attention to the year 1945 when you were general partner and when your brother was a limited partner and you were a limited partner as a trustee, what were the respective interests of the partnership?

(Testimony of Joe Goldstein.)

A. I can't remember that, Mr. Greaves.

Q. Can you give us a general statement?

A. I should say not. I don't see—

Q. Did you own 50 percent of the partnership, more or less?

A. I can't remember exactly what I owned.

The Court: Mr. Goldstein, will you wait until the question is finished, and the same for you. You have been interrupting him before his answer is completed.

By Mr. Greaves:

Q. As a partner, did you share in the profits and the losses of the limited partnership?

A. Of course.

Q. Did the other partners share in the profits and [246] losses of the limited partnership?

A. Why, of course.

Q. Do you recall what percentage of the profits you received? A. Of course not.

Q. Ten percent?

A. I can't.

Q. More? You have a general idea?

A. I do not, and I'm sorry.

Q. All right. A. All right.

Q. The loss was also shared?

A. I can remember this, and don't hold it against me, because I am a good figure man—I am not good on dates—I am proud to say we have never had any loss years.

Q. I direct your attention to the lease agreement between the Boys Markets, operating as a limited partnership, and the Torley Land Company.

(Testimony of Joe Goldstein.)

A. Yes, sir.

Q. If you want me to present that to you, I will do so. Would you like to have that lease before you?

A. No.

The Court: It is here for his reference if he wants it.

The Witness: I don't need it. [247]

By Mr. Greaves:

Q. I believe that you testified on direct examination that you were the representative of the limited partnership in the negotiations for this lease with the Torley Land Company, is that correct?

A. Yes.

Q. And may I assume that you are generally familiar with the terms of this lease at this time?

A. The high points, the ones that count, I am.

Q. I now call your attention to Paragraph 15 of the lease, which is at Page 22, if you would like to refer to it, and ask you if that is the paragraph that you have testified to with respect to being personally liable under this lease to the Torley Land Company, in the event of defaults and one thing and another?

A. I guess I will have to look at it.

I would say so.

Q. Was your personal liability under this lease ever asserted against you by the Torley Land Company?

A. How could it have been?

Q. It was not?

A. What do you mean by "asserted" against me? I have trouble with—

(Testimony of Joe Goldstein.)

Q. Did the Torley Land Company make a claim against you at any time during the period of this lease, on the basis [248] of your personal liability?

A. They let me know that I had it in a letter—in a letter that was sent to us by the Torley Land Company.

Q. Did they make any claim against you?

A. How could he make a claim against me? Again what? I hadn't defaulted on anything. No one had defaulted. So apparently he didn't.

Q. Is it your testimony that he did or that he did not? A. Did not.

Q. Thank you. I believe you stated a few moments ago that you were the general manager of the limited partnership, insofar as coordinating its activities were concerned, and you were also the general partner of the limited partnership? A. Right.

Q. By virtue of your position, would it be accurate to state that you were the guiding genius of the Boys Markets? A. Quite a compliment.

Mr. Campbell: I am going to object to the form of that question.

The Court: You don't have to explain what you mean by that.

Mr. Campbell: I object, it is incompetent.

The Court: Sustained.

By Mr. Greaves: [249]

Q. Who was responsible for the success of the Boys Markets? A. Who was responsible?

Mr. Campbell: I am going to object as immaterial, if the Court please.

(Testimony of Joe Goldstein.)

The Court: I will overrule the objection.

The Witness: The question again?

By Mr. Greaves:

Q. Who was responsibile for the financial success of the Boys Markets in various business forms?

A. I would say that Albert, Bernard, Edward, Max Goldstein and Joe Goldstein.

Q. Would it be correct to state that you were the only member of your family that was with the Boys Markets from its inception in 1925 up to and including to date?

Mr. Campbell: Objected to as assuming a fact not in evidence, that the Boys Markets was in existence in 1925.

The Court: I will sustain the objection. I can't see the materiality or the relevance of such a question to this issue.

Mr. Greaves: All right.

By Mr. Greaves:

Q. Who initiated the idea, insofar as the members of the limited partnership were concerned, that the San [250] Gabriel property should be leased from the Torley Land Company?

A. Who initiated the idea that it should be leased?

Q. Among the boys.

A. Among the boys, oh, I would say—if you would say who should lease it, I can answer. I am sorry. Maybe I can answer it this way: Mr. Eddy had quite a lot to do with convincing us that we should have a lease. We should accept the ground lease.

Mr. Greaves: I asked who initiated the idea, your

(Testimony of Joe Goldstein.)

Honor, not who convinced the other members that they should lease the property.

The Witness: I would then have to answer that I did. That would be the proper answer.

By Mr. Greaves:

Q. As between yourself, as the representative of the Boys Markets, in this lease transaction, and the Torley Land Company, who initiated the idea that the Boys Markets should lease this San Gabriel property?

A. Between—

Q. Did you or did Torley Land Company originate the idea? Did you go to Torley, in other words, or did Torley come to you?

A. I went to Torley.

Q. Do you remember who represented Torley in those [251] lease negotiations?

A. Mr. Torley.

Q. Mr. Joseph or Mr. Ray?

A. No, Joseph Torley. Mr. Ray Torley might have entered in some at different times.

Q. With whom among the members of the limited partnership did the idea originate that the limited partnership should cease operations?

A. Limited partnership should cease operations? You say whose idea was it among us?

Q. Yes. A. Probably mine.

Q. You can't be any more specific than that?

A. Well, no.

Q. Was it yours or was it not, in other words?

A. No, because I didn't insist on it. It was dis-

(Testimony of Joe Goldstein.)

cussed and I probably broached the idea, and so it became—

Q. That would be as close as you could come?

A. Don't put words in my mouth.

Q. I am asking for a more specific answer.

A. I can't give it to you any more specific.

Q. Then you discussed this matter with the boys?

A. Yes.

Q. What reasons did you give the boys? [252]

Mr. Campbell: I am going to object. I wish to interpose an objection, again, that all of this is immaterial to the issues here, no bearing upon the issues.

The Court: I will overrule the objection.

The Witness: Now, you want to ask me that again?

By Mr. Greaves:

Q. What reasons did you give to the boys for that change of business form?

A. Well, to the best of my recollection, I think I told them that, on the advice of Mr. Eddy and some of our auditors, that that would be the logical thing for us to do; the time had come to change over to a corporation.

Q. Did you discuss the reasons that the auditors presented to you?

A. We discussed some of the reasons, yes.

Q. Who determined that the assets of the limited partnership should be traded or exchanged for stock in the corporation?

A. I don't know, I guess we took the advice of our advisors. I can't say who initiated it.

(Testimony of Joe Goldstein.)

Q. Would you say your advisors initiated it?

A. What?

Q. Would you say then that your advisors initiated this idea and convinced you of its wisdom?

A. Oh, definitely. [253]

Q. What reasons were given to you for the receipt of stock in exchange for the assets, rather than outright sale?

A. This could take an awful long time. I would be glad to answer.

The Court: Just a moment. Mr. Greaves, if you are simply trying to develop who had the idea and carried through the chain from partnership form to corporate form, there might be some relevance to it, but I fail to see the necessity of going into all these details.

Mr. Greaves: All right, your Honor. Strike that question.

By Mr. Greaves:

Q. Can you tell the Court the approximate value of assets of the corporation?

A. No. I would just be making a guess. I don't keep those figures in my mind.

Q. Can you recall approximately how many shares of capital stock of the corporation, the partnership received?

A. Believe me, I can't.

Q. Do you know the par value of that stock on the date of the exchange?

A. I'd have to make a guess.

Q. Would you make a guess?

(Testimony of Joe Goldstein.)

A. A hundred dollars. [254]

Q. A hundred dollars a share?

A. Par. I am guessing.

Q. Do you know what the number of authorized shares of capital stock—

A. No, I do not, offhand.

The Court: If these matters are relevant at all, it seems to me that the documentary evidence would be the best evidence.

Mr. Campbell: If the Court please, these matters are contained in the stipulation as to the 5500 shares and how and in what manner they were issued.

By Mr. Greaves:

Q. Did you receive any shares of stock from the partnership in this exchange, as a result of this exchange?

A. I must have.

Q. You don't recall?

A. I transferred my interest in the partnership to the corporation. I didn't do it for nothing.

Q. Did Edward also transfer his shares?

A. Why, of course.

Q. And Max?

A. I can't remember just what happened exactly with Max. As I say, we had a family problem and—

Q. Did he get shares of stock as a result of this transfer? [255]

A. Trustee, somehow, yes, I believe so, Mr. Greaves. The Trustee—it is awfully hard to remember. I am not trying to evade it.

Q. Did you testify that you were the chairman of

(Testimony of Joe Goldstein.)

the board of directors of the Boys Markets, the corporation?

A. Not as an officer, as such. I have acted as chairman at a lot of our board of directors' meetings.

Q. And other directors have also acted as chairman?

A. Oh, I wouldn't remember. I imagine at times it would have been very common for such a thing to occur.

Q. Now, moving to the events leading up to your acquisition of the San Gabriel property from the Torley Land Company, I believe you stated on direct examination that you initiated the negotiations?

A. Yes.

Q. With Mr. Joseph Torley? A. Yes.

Q. When you ran into him at Santa Anita?

A. Right.

Q. Do you frequently go to Santa Anita, or was that just a chance—

A. Do you really care?

Q. I just wondered if this was just a chance meeting.

The Witness: Do I have to answer that?

The Court: No, I don't think so. [256]

By Mr. Greaves:

Q. I believe that you also testified on direct examination that you commenced these negotiations with Mr. Joseph Torley late in December of '52 or early January or early in 1953, January?

A. Yes, I think that's the right time.

Q. I believe you further testified with respect to

(Testimony of Joe Goldstein.)

these negotiations that it would be hard to say who originated the idea of the trade, is that correct?

A. I did say that, yes.

Q. Why is it hard to say?

A. Why is it hard to say? You know, well, to expedite this, I'll say I now remember that I did.

Q. You also testified that for sometime, indefinite amount of time prior to meeting Mr. Torley late in '52 or early '53, you had tried to purchase this land from the Torley Land Company for cash?

A. Oh, yes.

Q. But that he was unwilling to sell?

A. That's right.

Q. Did Mr. Ray Torley take part in these trade negotiations?

A. Well, Ray and J. B. are good horse traders.

Mr. Campbell: Pardon me. That can be answered "Yes" or "No." [257]

The Court: Yes, please.

The Witness: Yes.

By Mr. Greaves:

Q. Now, with respect to the board of directors' minutes that were placed in evidence by reading yesterday, the minutes for the January 27, 1953 and January 28, 1953 meetings, are you familiar with the fact of these minutes at this time?

A. Yes.

Q. Are you also familiar with their content, that is, not in direct language, but the effect?

A. Yes.

Q. Are you familiar with their form?

(Testimony of Joe Goldstein.)

A. Yes.

Q. Can you recall at this time whether the entire board of directors attended these two meetings?

A. No, I can't recall whether the entire board attended those two meetings.

Q. Did your wife attend these meetings, to your knowledge at this time?

A. To my knowledge, I don't know whether she did or not. I really don't know.

Q. Do you recall whether these meetings were formal?

A. Well, they weren't, probably were not formal.

Q. Were minutes kept for each and every meeting of [258] the board of directors of the Boys Markets, Incorporated? A. No.

Q. Would it be accurate to state that the board of directors held more meetings without minutes than in which minutes were maintained?

A. Oh, no.

Q. Who on the board of directors is responsible for keeping the minutes of these meetings?

A. Mr. Eddy.

Q. Were you in court yesterday when Mr. Eddy testified that he made these—and I refer you now to the minutes, first, of the January 27, 1953 meeting?

A. Yes.

Q. And, secondly, the April 28, 1953 meeting?

A. Yes.

Q. And ask you now if you recall Mr. Eddy's testimony that those minutes were recorded from notes, and

(Testimony of Joe Goldstein.)

that they were recorded anywhere from a week to a month after the meeting?

A. You mean these particular meetings?

Q. Yes.

The Court: The question is, do you recall his testimony to that effect?

Mr. Campbell: I am going to object then to the question in that form. The record will speak for itself, [259] if the Court please.

The Court: I will overrule the objection.

Mr. Campbell: It may be a preliminary thing.

The Witness: I was in the courtroom when I heard Mr. Eddy. Now, was his testimony about just these two meetings?

By Mr. Graves:

Q. Yes.

A. Or all the—

Q. These two meetings were all that we were talking about at that time.

A. Yes. They were notes; notes were made during the meeting, to the best of my recollection; possible that minutes were kept, also. But, to my recollection, it would be notes.

The last few years—

Q. And that those notes were transcribed in this form anywhere from a week to a month later?

A. No.

The Court: Are you asking him still whether he was in the courtroom and recalled Mr. Eddy's testimony?

Mr. Graves: Yes.

(Testimony of Joe Goldstein.)

The Court: Do you understand what he is asking you?

The Witness: yes. [260]

By Mr. Greaves:

Q. Do you recall that testimony?

A. Yes.

Q. I wonder if you would look at those notes and inform me whether or not there is a date of recordation on those notes, that is, that they were entered a week after each of the meetings or a month after each of the meetings? A. What notes?

Q. The minutes. I am sorry.

A. This was held April 28, 1953, 2:00 p.m., and you want me to—what is your question?

Q. I would like to know if there is a date other than that date on there, which is the date these notes were transcribed in this form.

A. You want me to read this? Well, I will read it and see if there is one. I don't know.

Mr. Campbell: Is that a matter we can stipulate to, rather than his examining the record? You say there is no other date?

Mr. Greaves: Right.

Mr. Campbell: I will agree there is no other date.

By Mr. Greaves:

Q. Did you take part in both of those meetings as a director of the corporation? [261]

A. Yes.

Q. In the meeting of January 27, I believe, the minutes note the fact that it would be possible to purchase the San Gabriel property, is that correct?

(Testimony of Joe Goldstein.)

A. I don't think so. It stated it might be possible to purchase the land now under lease on which we built the San Gabriel market, and that the purchase of this land would enable us to procure a loan on the property and increase our working capital.

Q. That is the meeting of January 27, 1953. Does that president refer to you? A. Yes, sir.

Q. Would you tell us what additional information with respect to the San Gabriel property you furnished the board of directors at the April 28th meeting, and I refer you specifically to the second page of the minutes, and I believe the second or the first full paragraph on that page, and the last sentence.

A. Oh, yes.

Q. I will ask if you will read that.

A. About the possibility of purchasing the land on which the San Gabriel—

Q. Would you just read that portion?

A. "It has now been decided that Joe Goldstein and Lillian Goldstein would buy this land as their private [262] property, and they may at sometime in the future sell it to the Boys Markets."

Q. Can you tell me whether the deal that you had made with Torley was a definite and certain deal as of April 28, 1953?

A. No—April, '53?

Q. April 28, 1953.

A. Can I ask—I would like to know the date that we went into escrow.

Q. June 22, 1953.

A. Then in April, '53 it was not a definite deal.

(Testimony of Joe Goldstein.)

Q. I believe you testified on direct examination that the reason why this deal wasn't consummated sooner than June 22, 1953 was the fact that Mr. Torley was a shrewd businessman and a hard bargainer?

A. Right.

Q. Did you also testify that he reneged on a couple of deals?

A. Yes, a couple offers.

Q. On the same property? A. Yes.

Q. When did you say that Ray Torley told you Torley Land Company would accept only Las Vegas property in exchange for its San Gabriel lot, the approximate date?

A. Of when he told me? [263]

Q. Yes.

A. That would be in early '53.

Q. Prior to April 28, 1953 or subsequent thereto?

A. Prior.

Q. But you weren't sure at April 28, 1953 whether or not in fact you would be able to purchase this land, were you?

A. Right.

Q. Why were you so desirous of acquiring the San Gabriel property?

A. The main reason for acquiring it was to get from under that personal liability that I was advised I ought to get out from under. That was one of the main reasons.

Q. In your negotiation with Ray Torley for this property, isn't it a fact you stated you wanted this

(Testimony of Joe Goldstein.)

property in order to secure loans with which to build further markets?

A. Well, now, I don't want to go into detail.

Q. I am just asking you this question. You can answer it "Yes" or "No." Did you or did you not state in effect that you wanted this land in order to secure loans for the building of further markets?

A. I would like to answer it this way: I must have said that, among other things, sure. [264]

Q. That's fine.

A. Yes.

Q. And after you heard or learned that the Torley Land Company would only accept Las Vegas property in exchange for the San Gabriel property, you so informed the other members of the board of directors?

A. Yes.

Q. And that is the information you gave them that is recorded in the April 28, 1953 meeting, is that correct? A. Yes.

Q. At what time did you know the amount of money that would have been spent for the Las Vegas property, and improvement thereon? A. What?

Q. And improvement on that property?

A. When did I know absolutely?

Q. Yes.

A. About one minute after the escrow papers were signed.

Q. And this was because Mr. Torley was such a shrewd operator?

A. Not necessarily. In my experience in property deals, and a lot of others, I never know I had a deal until the papers are signed.

(Testimony of Joe Goldstein.)

Q. With whom did you negotiate as to a definite [265] amount to be spent for this property and improvement?

A. Most of it was spent with J. B. Torley, the father.

Q. Did you have to satisfy his desires as to the lot and the building to be erected thereon?

A. Yes, sir.

Q. And part of the negotiation then would have to be in bargaining over the lot and bargaining over the specs for the building? A. Right.

Q. Now, you say that you advanced the idea of an exchange of properties to the Torley, to Mr. Joseph Torley? A. Mr. Joseph Torley.

Q. Or to the Torley Land Company? A. Yes.

Q. Did you also get the fancy idea that this would be a tax-free exchange?

A. Possible.

Q. Did you testify earlier in this case that the Torleys' basis in this land would be very low?

A. Yes, sir.

Q. Was it your purpose in acquiring this San Gabriel property from the Torley Land Company part of an over-all plan by means of which you could realize $40,000.00 tax-free income, your corporation to get a stepped-up basis in this [266] property of $75,000.00 and the Torleys could delay the date of reporting again on the sale of this property?

A. Well, I am glad you asked that question. We originally started out to buy this property.

(Testimony of Joe Goldstein.)

Q. We?

A. I would say—I don't know whether it was a limited partnership at that time or a corporation, but whatever the status of the group of us boys were at that time, Mr. Torley accepted a figure, approximately $25,000.00, for the land.

I went out there and took a cashier's check out to Mr. Torley, and there was no deal.

So we waited a few moments, and I came out with a check of $35,000.00 and another one of $50,000.00. When I got through negotiating over the thirty-five, I saw there was no use of bringing out the $50,000.00 check. So I went back to my office and reported to the boys that this old boy was too rough for me, and tore up the checks.

There were no more negotiations for months, might even have been a year, and I accidentally ran into him, and in the course of kidding each other—and I still wanted this property—"No, I'm not going to sell it. My tax rate would be high."

And "Well, Mr. Torley, maybe a trade?"

And "Well, I would have to think about it." [267]

Well, that was enough. We might have had another call or two. I might have run into him again. I wanted the property. Probably talked to Ray Torley in Ontario, found out then his dad had moved up to Las Vegas.

Q. Do you recall the date of this?

A. No. Mr. Ray Torley thought maybe the old man might be interested in a trade, but it would have to be in Las Vegas.

(Testimony of Joe Goldstein.)

"All right, fine, see what we can do." And we left.

I reported back to the rest of the directors that this was the situation. It was going to have to be a trade in Las Vegas, and I wondered then what would happen. I didn't like the idea and neither did any of the other boys, but we still wanted to acquire the fee.

I missed something. I got ahead of myself. I tore up those two checks. We got into a discussion, and I walked out with a deal paying him $800 a year rent for 50 years on a piece of property slightly under three acres.

I called him the next morning and I said, "J.B., you got the worse of this deal. I think now you ought to see your attorney, talk it over, and let me buy it."

And his attorney, to the best of my recollection, tried to convince him that he should sell it to the Boys Markets, and not that 50-year lease at $800 a year, but [268] I guess his pride was hurt or something, and you just couldn't talk to him, and the deal went through on this ground lease, see.

Now, when we get—I still wanted the fee. It is much better, in my opinion, to own the fee than to have a ground lease, regardless of what reasons you might have in mind.

Q. Let me interrupt you at this point to ask you what you mean by it is much better in your opinion to own a fee, and specifically for whom to own the fee?

A. In most cases, for anyone, would rather own the property than have a ground lease.

Q. When you refer to "we," in this narrative, are

(Testimony of Joe Goldstein.)

you referring to your corporation rather than to yourself and your wife?

A. No, the corporation, of course.

Q. In this narrative would you specify?

A. Corporation.

Q. Right, and yourself, where these might become important distinctions to be made?

A. Not necessarily.

Q. Will you as you progress from hereon, in discussing this matter, say, "It would be a good idea for the corporation" or "for Mr. and Mrs. Goldstein." Thank you.

A. So we then—in our meeting, of course, the boys [269] wanted no part of it, of going up to Las Vegas, and I wasn't too happy going up there myself, but I had this personal liability that I was stuck for, and, as I said yesterday, it came more to my attention as I got into settling, trying to put my estate in proper shape.

So I made a couple of trips up there, engaged a real estate man, gave him the story, and had him look up Mr. Torley, and we finally found the lot and agreed on the price and went ahead with the deal, and, luckily, it was closed.

When I went up there and started negotiations with Mr. Torley, I did not know whether I would pay $35,000.00, $50,000.00, $75,000.00, had no idea.

Q. Do you recall the date that you went there or the dates, just approximately? Was this after April of '53?

(Testimony of Joe Goldstein.)

A. Oh, no, before. It would have to be before April, April, May, June.

Q. Now, you were looking for property to try to satisfy Mr. Torley during this time?

A. Yes.

Q. And you say you went up to Las Vegas on two occasions, to the best of your recollection?

A. At least two.

Q. More than two, possibly?

A. Possibly. [270]

Q. In any event, the trip or trips that you made to Las Vegas were before April of '53, or would they be between January and the time these escrows were closed, without trying to pin it down definitely?

A. I would say around April.

Q. April, May,—May, as well?

A. Probably.

Q. June up until the 22nd?

A. Our deal was closed then. Was that when our escrow was closed?

Q. Yes.

A. I might have been there in June.

Q. You were discussing having gone up to Las Vegas.

A. And we consummated the deal. That was the end of it.

Q. And you consummated the deal in Las Vegas?

A. Yes.

Q. You came back to Los Angeles?

A. Right.

(Testimony of Joe Goldstein.)

Q. Did you go out to Ontario to open these escrows?

A. I went out or sent Mr. Eddy out.

Q. Mr. Torley came in from Las Vegas for that purpose? A. Presume so.

Q. You state that one of the reasons, I think you [271] stated this a little more clearly on direct examination yesterday, one of the reasons that the board of directors was opposed to the purchase of this Las Vegas property for exchange with the Torley Land Company for that San Gabriel property was that Torleys demanded property in Las Vegas, right? A. Yes.

Q. And nowhere else? A. Nowhere else.

Q. And is it also correct that you testified that you and your brothers didn't want any part of Las Vegas for personal reasons? A. That's right.

Q. Which brothers felt this way, in addition to yourself, all of them? A. Yes.

Q. Did Everett Eddy have the same view, to your knowledge? A. Oh, he didn't express that.

Q. Can you honestly say, as a reasonable man, Mr. Goldstein, that as a reasonable reason for a director of a corporation to turn down a possible business deal because it entails going to an area, or the possibility of his having to go to the area, or a possibility this corporation will then become involved in an area that he personally [272] doesn't like?

A. Absolutely, yes; in my case, in our case.

Q. Isn't it a fact that there would have been absolutely no reason for your brothers to have gone to Las Vegas if the corporation had purchased this property?

(Testimony of Joe Goldstein.)

Mr. Campbell: Just a moment. I am going to object as calling for his conclusion, as to the reasons for his brothers going to Las Vegas.

I will further object that it is immaterial and argumentative, if the Court please.

The Court: I think you can ask him—the question seems to be directed as to whether there would have been any fee for any one of the individuals to go to Las Vegas, had the corporation bought the property, I mean, entered into this transaction.

Mr. Greaves: May I rephrase the question?

The Court: Yes.

By Mr. Greaves:

Q. As the president of the corporation, would there have been any corporate reason for any of your brothers to have gone to Las Vegas, connected with the purchase of this property, if the corporation had in fact purchased it?

Mr. Campbell: I am going to object again on the grounds of materiality, and my objection is based upon this, your Honor, that whether or not the reasoning of the [273] other members of the board of directors in declining the deal was valid or reasonable or was based upon valid assumptions or was good or bad business, I submit, is immaterial to the issues of this case. I object upon the ground that this question is immaterial.

The Court: Well, I don't understand the question quite the same way you do. He has simply asked if there is any corporate reason for any one of the members of the board of directors or the brothers to have gone to Las Vegas had this transaction been entered

(Testimony of Joe Goldstein.)

into by the corporation. I think that may be very material. I will overrule the objection.

The Witness: Yes, there could have been reasons.

By Mr. Greaves:

Q. There could have been reasons? A. Yes.

Q. Would you have gone to Las Vegas for your corporation to negotiate on this property?

Mr. Campbell: Again, I object on the grounds that it is immaterial and speculative, if the Court please.

The Court: I think it is speculative. I will sustain the objection to the question in that form.

Mr. Campbell: May we have the morning recess at this time?

The Court: Well, just a moment. How much more [274] cross-examination?

Mr. Greaves: I contemplate not too many more questions, your Honor, but I think that it might be a good idea to break at this time.

The Court: All right. We will recess for five or six minutes.

(Short recess taken.)

The Court: Proceed.

By Mr. Greaves:

Q. I believe the last question you answered, Mr. Goldstein, had to do with reasons, corporate reasons, that would have taken your brothers to Las Vegas in the event the corporation had purchased this property.

A. And I answered yes.

Q. Would you list the reasons?

A. It's awfully hard to list the reasons, because they are so speculative. There could be just numbers of

(Testimony of Joe Goldstein.)

reasons, numbers of things that could come up when you get involved in building something. You just don't know what those reasons would be, but there is always that calculated risk.

Q. Did you go to Las Vegas with respect to negotiations on this property with Mr. Torley?

A. Oh, definitely.

Q. Did you go to Las Vegas after the escrows had [275] been entered with respect to this property?

A. Yes.

Q. Did you go to Las Vegas with respect to the erection of the building?

A. I went up there once for that reason, yes.

Q. Your brothers had some personal reason for not liking Las Vegas, is that correct?

A. That's right.

Q. But it was worthwhile for you as an individual to overlook this personal reason in a personal transaction?

A. Well, I had quite a bit to gain. I had to get out from under.

Q. Would the corporation—

Mr. Campbell: Again, he did not finish his answer.

The Court: Yes. Will you read the answer as far as it goes?

(The record was read.)

The Witness: Personal liability.

By Mr. Greaves:

Q. Wouldn't the corporation have had something to gain in this transaction?

(Testimony of Joe Goldstein.)

Mr. Campbell: Objected to as argumentative.

The Court: Overruled.

The Witness: Would the corporation have anything [276] to gain? At that time it was very speculative whether they would or not, because we must remember we had never at no time knew how much money it would take to finish up this deal, up until the time the escrow was closed.

By Mr. Greaves:

Q. Was there any reason to believe that the deal would be less advantageous to the corporation than it was to you personally insofar as the amount of money that would be required to be spent in Las Vegas was concerned?

A. Well, again, it depended on what the price of the property would be.

Q. Now, are you through? A. Yes.

Q. You negotiated with the Torleys in your personal capacity both in Los Angeles and in Las Vegas?

A. Right.

Q. Would you not have been willing to negotiate with the Torleys in your capacity as president of your corporation?

A. Oh, I believe I would have.

Q. So you could have gone to Las Vegas for your corporation, as well as for yourself?

A. I wouldn't have—without that personal liability in there, I might not have been in such a hurry to get it done. [277]

You must remember, the rental paid on the property wasn't bad.

(Testimony of Joe Goldstein.)

Q. Is it your testimony at this time that the only reason you went to Las Vegas was to avoid the liability involved in the Torley lease?

A. I'd have to answer yes. That's what it was.

Q. Did it occur to you that you would have avoided the liability under the Torley lease if there was no lease? A. Say that again.

Q. Did it occur to you that you would have avoided the liability under the Torley lease if there had been no lease in existence?

A. I can't understand what you mean.

Q. All right, Mr. Goldstein, let me try it this way then, if I may: I know you are not a lawyer, Mr. Goldstein. Therefore, I do not seek a legal interpretation on your part, but, rather, as an experienced businessman and a man who has had admittedly dealings in property, personally, and as the representative of the Boys Markets, I would like your opinion on this question. Do you understand?

A. Yes, I understand.

Q. . What would have been the effect had your corporation first purchased the San Gabriel property?

Mr. Campbell: Just a moment.

The Witness: Let me answer. [278]

Mr. Campbell: Just a minute. I am going to object, if the Court please. That calls for a legal conclusion and calls for a conclusion in the form of the present question, as immaterial. It has no bearing upon the issues of this case, what his opinion was in that regard. The liability is a matter fixed by law and can be deter-

(Testimony of Joe Goldstein.)

mined from the instruments which are here before the Court.

The Court: I think the question calls for a legal conclusion, and certainly this witness isn't qualified to give a legal conclusion as to the legal effect of it. However, if this entered into his thinking in any way as to why—he stated that this was one of the principal reasons for his being willing to go into this transaction individually, and I think this is simply a question directed as to his thinking, not as to the actual legal effect, as to the acquisition of the property by the tenant.

Can you answer the question?

The Witness: If she will read it back to me again.

Mr. Greaves: Would it be permissible to rephrase it?

The Court: Yes.

By Mr. Greaves:

Q. What would have been the effect on the Torley lease if the Boys Markets, the lessee, had purchased the San Gabriel property, which was the subject of the lease? [279]

Mr. Campbell: I must object again.

The Court: I will sustain the objection. I don't think you have laid a foundation for that question.

Mr. Greaves: Would you repeat the first question I asked this witness?

Mr. Campbell: If you want to say, "What did you believe the effect to be," I will have no objection to the question.

The Court: That is right. Rephrasing the question asks for only a legal conclusion. I will sustain the ob-

(Testimony of Joe Goldstein.)

jection to both the first question asked and the most recent.

By Mr. Greaves:

Q. What do you believe would have been the effect on the Torley lease? A. If what?

Q. If the lessee had purchased the property that was the subject of the lease?

A. I would have been out—my thinking would be that I would be out from under the liability, personal liability.

Q. Then would it have made any difference in your belief whether you personally or the corporation purchased the property?

A. I don't think it would have made any difference [280] if the property would be purchased, but Mr. Torley would not sell the property.

Q. By "purchased," in this case, I mean purchased for property in Las Vegas.

A. That I can't—that becomes complicated.

Q. Just insofar as—

A. I can't answer that. That one I can't answer.

Q. But in fact you went to Las Vegas on a number of occasions to negotiate with the Torley Land Company in this personal transaction? A. Yes.

Q. The record in this case contains many references as to the aversion or dislike of your brothers and yourself for Las Vegas.

Would it be a fair statement to say this was all just personal feeling?

A. Feelings—personal feelings?

(Testimony of Joe Goldstein.)

Q. Just a personal viewpoint? They didn't like Las Vegas? A. Sure, that's right.

Q. Did you as a director of the corporation reject your corporation's purchasing this property, San Gabriel property, because it required exchanging for property in Las Vegas?

A. I think it was known that it made no difference [281] to me whether the corporation got involved or not.

Q. Now, on direct examination this morning I believe you testified with respect to a contract for the erection of a building on property in Las Vegas that you were a party to, is that correct, sir?

A. Yes.

Q. Do you know what I make reference to?

A. Yes.

Q. Couldn't your corporation have entered this contract, as well as you?

Mr. Campbell: Just a minute. I am going to object to that. That is calling for a legal conclusion. If counsel wants a legal answer, the answer is, of course, the corporation could have entered into a contract for the erection of the building.

The Court: I don't know that it necessarily calls for a legal conclusion. I will overrule the objection. I don't assume that you are looking for an answer as to whether they could legally have done it or not, but whether the corporation, as opposed to the individual, might have made a contract for this building?

Mr. Greaves: Yes.

Mr. Campbell: Wouldn't that be a matter of what was within the powers? Whatever is within the powers

(Testimony of Joe Goldstein.)

of the corporation, of course, the corpration could do. [282] Whether they choose to do those things or not, of course, is a different question. But when you say could the corporation have entered into such a contract, it calls for what are the powers of the corporation; what powers does the corporation have. The powers of this corporation, so far as I know, embrace the entering of all types of contracts having to do with the acquisition of property or the construction. I will so stipulate.

Mr. Greaves: That is satisfactory, your Honor.

By Mr. Greaves:

Q. I believe you testified here a few minutes ago with respect to negotiations with Mr. Torley relative to purchasing the San Gabriel property for cash, do you recall? A. What was that?

Q. I am just trying to refresh your—

A. What was that, again?

Q. That you testified regarding negotiations and, I believe, two deals you had cooking with Mr. Torley?

A. Yes.

Q. Relative to the purchase of the San Gabriel property for cash? A. Right.

Q. And that he rejected these offers, and at one time I believe you testified further that at one time you [283] went to Mr. Torley with a $35,000.00 cashier's check, is that correct? A. Correct.

Q. And that he rejected that, and that after his rejection you not only destroyed the cashier's check for $35,000.00, but also a cashier's check for $50,000.00 that you had brought along with you?

(Testimony of Joe Goldstein.)

A. A personal check; not a cashier's check, a regular check.

Q. These were not cashier's checks?

A. All but one. The fifty thousand was not a cashier's check. The others were, thirty or thirty-five thousand was.

Q. You tore this check up, I believe you testified?

A. Yes.

Q. Are you in the habit of tearing up cashier's checks?

A. I don't mean I tore it up. It was turned in. I tore up the other one.

Q. I believe you stated on direct examination that as another reason for the board of directors' rejection of the exchange of properties, it had something to do with involving your corporation in interstate commerce if it purchased Las Vegas property, is that correct?

A. Yes. That's one of the reasons why I thought [284] the corporation should forget about it. That was when Eddy interjected his thoughts that if the corporation was to engage in anything that was of an interstate nature, we might be in violation of our Provident Mutual Insurance loan.

Q. I am only speaking now of involving your corporation in interstate commerce.

A. That's what I mean. That's what it is.

Q. Did you consult a lawyer on this matter?

A. Mr. Eddy must have gotten some advice on that. Those things are always left up to him.

Q. But you did not consult a lawyer?

A. I did not, no.

(Testimony of Joe Goldstein.)

Q. But this was another reason why you as a director felt the corporation shouldn't purchase this Las Vegas property?

A. I would have to say that had a lot of bearing, yes, that helped to make up my mind.

Q. So, in fact, you did have some feeling on the matter of your corporation's purchase of this property, didn't you?

A. On the purchase of it, yes, I had some feeling.

Q. That is, the purchase of the Las Vegas property?

A. Oh, I thought you meant the Valley Boulevard property. Then would you ask me that again? [285]

Q. Then you must have had some belief as a director that your corporation should not have purchased Las Vegas property, and this transaction did make a difference to you? A. Yes.

Q. Did Mr. Eddy in explaining this involvement in interstate commerce, to your knowledge, base his advice, as expressed to the board of directors, on legal advice?

A. Not necessarily.

Q. Well, —

A. I wouldn't know whether it was on—

Q. That's fine. Now, as another reason for your decision as a director of the corporation for rejecting this exchange proposition for your corporation, I believe you stated something having to do with the Provident Mutual Insurance Company of Philadelphia?

A. Yes.

Q. Could you explain this to us?

(Testimony of Joe Goldstein.)

A. Well, not too easily, but we have—there is a number of negative covenants in there that are just too hard for me to explain it to you or anyone else. But they look kind of forbidding.

Mr. Greaves: Your Honor, I have not had sufficient time to read this entire note agreement between the Boys Markets, Incorporated and the Provident Mutual Life [286] Insurance Company of Philadelphia, that is before this Court as Petitioners' Exhibit No. 9, I believe, for identification only.

I have, however, looked at that portion of this agreement that was pointed out to me by petitioners' counsel, that is, 6(a), 6 and (a), thereunder, and would request your permission to have the petitioner at this time read those provisions into the record, Paragraph 6 and (a).

Mr. Campbell: Might I suggest, if counsel desires to do that, the document be withdrawn; I have no objection, if the Court has none, of photostatic copies being made of any portion you want. The matter was produced really as a convenience to counsel.

Mr. Eddy, who was on the stand, testified that he had expressed the opinion to the board of directors that he was in the belief that such a deal would possibly violate the terms of that agreement.

So we produced the agreement in order that counsel might see it, and marked it for identification, and I did direct his attention to what I understood were to be some pertinent provisions. That is the situation.

The Court: As I recall, Mr. Campbell, you were of-

(Testimony of Joe Goldstein.)

fering this document really to get into the record just Paragraph 6, Subdivision (a) which appears—

Mr. Campbell: As being the pertinent provisions. [287]

The Court: Which appears on Page 9, and that you have no desire to include the whole document, unless the respondent insisted on the whole document going in?

Mr. Campbell: Yes.

The Court: Now, Mr. Greaves, have you any objection to simply marking the pages of this document which Mr. Campbell is offering and introducing photostatic copies of those pages into the record?

Mr. Greaves: Well, the only page at this time I know of, your Honor, is this page that Provision 6 and (a) thereunder appear on.

The Court: As I understand it, that is all Mr. Campbell really wants in this record. However, he is willing to offer the whole document, if necessary.

Mr. Greaves: I would be willing to have that page—I believe that is on one page, is it not, sir?

The Court: Paragraph 6 (a) all appears to be on Page 9.

Mr. Campbell: I think that is correct. I have no objection to offering the document as it is.

Mr. Greaves: Simplify it by just photostating that page and having the Petitioners' Exhibit No. 9—

The Court: You would have no objection to offering the photostatic copy of Page 9 of this document?

Mr. Greaves: I would not, your Honor. [288]

The Court: Is that satisfactory with you?

(Testimony of Joe Goldstein.)

Mr. Campbell: May I see that particular page?

The Court: Yes.

Mr. Greaves: On advice from a far sager head than my own, it has been suggested that I might request leave of the Court to read this document in its entirety and determine whether there are other portions material to this case, and leave the record open for a reasonable time in which Mr. Campbell and I can get photostats and submit them to the Court.

Mr. Campbell: I think, as a matter of fact, your Honor, that possibly the entire document should be offered, because that portion standing alone really doesn't indicate what the document purports to cover, that is, the agreement purports to cover.

The Court: I agree with you. You offer the whole document as your Exhibit No. 9?

Mr. Campbell: I will offer the entire document.

The Court: Have you any objection to—

Mr. Greaves: Not at all, if respondent may get a copy.

Mr. Campbell: I was going to suggest, if it be agreeable, that respondent be permitted to take this and to make photostatic copies.

The Court: I think that we will be here all [289] next week and that while we are here you can check that out from the Clerk, Mr. May, and make either photostatic copies of the whole thing or whatever excerpts you want to take from it.

Mr. Greaves: All right.

The Court: Petitioners' Exhibit No. 9 will be received in evidence.

(Testimony of Joe Goldstein.)

(Petitioners' Exhibit No. 9 was received in evidence.)

Mr. Greaves: I wonder if the Court would have the petitioner familiarize himself with the provisions in 6(a) as preliminary to the questions I would like to ask?

The Court: Not at all.

Mr. Greaves: It won't be necessary to read this starting here and ending here aloud, but please familiarize yourself with it.

By Mr. Greaves:

Q. Have you read it? A. Yes.

Q. Would you state whether or not it is provided under Paragraph 6, that is, within that portion of this note agreement, Paragraph 6—

The Court: Of Petitioners' Exhibit 9.

Mr. Greaves: Thank you.

By Mr. Greaves: [290]

Q. Would you state whether or not, set out in Paragraph 6 of Petitioners' Exhibit 9, it is provided that the company which herein is the Boys Markets, Inc. agrees that all notes and interest thereon must have been paid in full—strike it. This is too difficult.

Mr. Campbell: I suggest the document speaks for itself.

Mr. Greaves: Right.

By Mr. Greaves:

Q. With respect to this document, and having familiarized yourself with this document, Mr. Goldstein, I ask you the following question:

Did the Boys Markets ever seek permission from the

(Testimony of Joe Goldstein.)

Provident Mutual Life Insurance Company of Philadelphia to incur a debt of $35,000.00, to your knowledge?

A. I don't think so.

Q. Additionally, Mr. Goldstein, would there have been, in fact, any reason for your corporation to have incurred a debt of any amount or in any manner because of the purchase of property in Las Vegas during the year 1953?

Mr. Campbell: That is objected to, if the Court please, because it is speculative, in that the corporation incurred no debt. It would also contemplate whatever type of contract speculatively the corporation might enter into. I will stipulate, if it assists counsel, [291] that no permission was sought from the Provident Mutual to enter into a transaction to acquire property for trade purposes in connection with this transaction.

I will also stipulate that the Boys Markets had a sufficient earned surplus at all times to have paid cash for whatever they did.

Mr. Greaves: That is agreeable, your Honor.

The Court: It is so stipulated.

By Mr. Greaves:

Q. I believe on direct examination yesterday, Mr. Goldstein, you testified that you were personally willing to purchase Las Vegas property for the exchange transaction and stand any risk there would be in loss as a result of this transaction, is that correct, sir?

A. Yes.

Q. I wonder if you would tell me what risk you might have contemplated?

(Testimony of Joe Goldstein.)

A. Oh, there was a lot of risks. There is always risk in a deal of that kind. I didn't know how much would have to be paid for it. I didn't know what I would do with it after I bought it; might have had an automobile accident driving to Las Vegas; all kinds of risks.

Q. Were you apprehensive at any time after you entered these escrow agreements, escrow contracts, referred to in this case as Petitioners' Exhibit 8, I believe, were [292] you apprehensive at any time when you became bound to this exchange of properties that you would lose money?

A. When I became bound to it?

Q. Yes.

A. No, I felt wonderful then.

Q. So there was no risk involved?

A. At that time?

Q. Financially?

A. After that time, there was none.

Q. Would you have purchased property in Las Vegas for exchange for more than $35,000.00?

A. Would I have purchased property for more than $35,000.00? Yes, sir, emphatically, yes.

Q. This exchange transaction, insofar as definite amounts of money were concerned, did not become definite until June 22, 1953, is that correct, sir?

A. Definite? That's correct.

Q. And is it also correct, sir, that any time before June 22, 1953 this entire deal was very speculative?

A. Yes.

Q. And it could have been terminated by either or

(Testimony of Joe Goldstein.)

both parties at any time prior to the signing of these escrow contracts?

A. Right. Q. I wonder if you could explain, Mr. [293] why the minutes of the board of directors, dated April 28, 1953, state that it has been decided that Joe Goldstein and Lillian Goldstein would buy this land as their private property and that they may at sometime in the future sell it to the Boys Markets? This refers, I believe, Mr. Goldstein, to land that you not only did not own but land that in likelihood you might not ever own, is that not correct?

A. Of course it's correct.

Q. Why was it necessary to provide such a thing as that in your minutes?

A. Oh, everyone has different ways of keeping minutes, I guess, and that was Mr. Eddy's idea. I saw no harm in it.

Q. Let's look now to your corporation's alleged purchase of the San Gabriel property from you and Mrs. Goldstein. A. Yes.

Q. Directing your attention first to the pertinent dates involved in these transactions with and for the San Gabriel property, is it correct that you and Mrs. Goldstein received the deed to the San Gabriel property on or about December 8, 1953? A. Yes.

Q. It is also correct that the alleged sale of this property, this San Gabriel property to your corporation, took [294] place on December 31, 1953?

A. Yes.

Q. How did you receive payment on $75,000.00, the alleged purchase price?

(Testimony of Joe Goldstein.)

A. I must have got it in the form of a check.

Q. A lot of money. Don't you recall how you got it?

A. To me, in business transactions, I would call that a very, very, very small amount on today's market, and I surely couldn't get anywhere if I recalled amounts like that that long ago, and if you are surprised I am not.

Q. I am not surprised. You can not recall whether you were paid in cash or by check?

A. I tell you one thing. I got the money, if that will help.

The Court: Answer his question, please.

The Witness: I can not recall.

By Mr. Greaves:

Q. But you received payment?

A. Can I re-answer that? I got a little upset there. I recall giving a check.

Q. Do you have with you today the minutes of the board of directors setting for the directors' decision to purchase the San Gabriel property from you and Mrs. Goldstein?

A. You mean this thing, this page here?

Q. There was no meeting in December of 1953? [295]

A. A meeting in December '53? To purchase the property?

Q. From you and Mrs. Goldstein?

A. There probably was.

Q. Do you have those minutes here?

(Testimony of Joe Goldstein.)

A. I don't know. I don't know whether they are in here or not.

Mr. Greaves: May I ask petitioners' counsel if the minutes for a meeting in which it was decided that the Boys Markets would purchase this property from the petitioners are here?

Mr. Campbell: I have to answer the same thing. I will take a look at the minute book for you.

The Court: The minute book will speak for itself.

Mr. Campbell: I might state for the benefit of counsel the last minutes appearing in this book appear to be the minutes of the stockholders of December 15, 1953, they are the last minutes appearing in this book.

The outside of the book is labeled "Minutes 1936 to 1953." Whether there are any minutes missing here I do not know.

By Mr. Greaves:

Q. Mr. Goldstein, do you know whether a meeting of the board of directors of the Boys Markets, Incorporated was held after you acquired title to this property, in which [296] it was decided that the Boys Markets would purchase this property from you and Mr. Goldstein?

Mr. Campbell: Pardon me. Might I suggest, if the Court please, it appears to me that these are immaterial matters. If the Government is contending that no sale was made, we are not here in court at all. We are involved in no transaction of any kind.

The Court: I think his question may be relevant. I think the witness is qualified to answer. He asked him

(Testimony of Joe Goldstein.)

if he knew. I will overrule it. You didn't put that in the form of a formal objection?

Mr. Campbell: Yes, I did. I intended to, your Honor.

The Court: I will overrule the objection.

The Witness: Did we have a meeting prior to December 31st? Yes.

By Mr. Greaves:

Q. Did you attend that meeting? A. Yes.

Q. Was it decided at that meeting that the Boys Markets should purchase this property from you, this San Gabriel property from you and Mrs. Goldstein?

A. Yes.

Q. Do you know the date of that meeting?

A. No. [297]

Q. Did it occur in December of 1953?

A. Oh, it could have been November, December, right around in there; it is awfully hard to remember exactly when it took place.

Mr. Greaves: Will counsel stipulate that there are no minutes for a meeting?

Mr. Campbell: No, I can not do that. I do not know.

Mr. Greaves: Would counsel stipulate that if there were minutes for a board of directors of the Boys Markets, Inc., in which meeting it was decided to purchase the San Gabriel property from Joe Goldstein and Lillian Goldstein, that such minutes would appear in that minute book?

Mr. Campbell: I can't so stipulate. I don't know, Mr. Greaves.

(Testimony of Joe Goldstein.)

By Mr. Greaves:

Q. You recall a meeting of this nature, do you not?

A. Yes.

Q. Did you vote at the meeting?

A. I don't think it would have been proper for me to vote.

Mr. Campbell: The question is, did you or didn't you?

The Witness: Oh, no. [298]

By Mr. Greaves:

Q. Do you recall who among your directors mentioned the amount of $75,000.00 as the purchase price?

A. Mr. Eddy.

Q. I believe you testified on direct examination that Mr. Eddy undertook an investigation of the fair market value of the San Gabriel property for the corporation? A. Right.

Q. Prior to the date that the corporation decided to purchase that property, is that correct?

A. That's correct.

Q. Do you recall the date of this investigation by Mr. Eddy? A. No, I don't.

Q. Does the corporation have any record of any investigation by Mr. Eddy?

A. I'd have to look at the minutes.

Q. Might I request you to do so during the noon break to ascertain whether you have such minutes?

A. Might be possible. If I can, I will.

Mr. Campbell: Might I suggest, he can examine what is here, of course, but it requires him going to his plant. I don't know if he can—

(Testimony of Joe Goldstein.)

The Witness: I don't know.

Mr. Campbell: How far is your office? [299]

The Witness: Well, I can get out there in time, but I can't get in the vault unless somebody is there that can open it.

The Court: Are you asking whether the minutes or any record in the minutes—

Mr. Greaves: Is present in court today.

Mr. Campbell: I will take your statement on that, Mr. Greaves. You tell me there isn't, I will agree with you.

The Court: Get together and look through the minute book and see if you can find something during your recess.

By Mr. Greaves:

Q. In addition to the figure of $75,000.00 that Mr. Eddy testified he found from discussions with personnel at the Bank of America, the fair market value of this property, did Mr. Eddy present the directors with any other basis for his view that this property was worth $75,000.00?

A. Not to my knowledge.

Q. And you were present at that meeting?

A. Yes.

Q. Could I then assume that he did not?

A. Did not.

Q. There was no appraisal of this property prior to the corporation's purchase thereof in 1953?

A. No. [300]

Q. So that certain testimony adduced in this trial is erroneous in that respect?

(Testimony of Joe Goldstein.)

A. I don't know what you mean.

Q. Were you present in court when it was testified that an appraisal had been made by the corporation prior to its purchase of this property?

A. Oh, I'm sorry. I didn't really understand your question.

Prior to the corporation's acquiring it? Well, of course, there was the appraisal made by Mr. Eddy, the Bank of America.

Q. Was this an appraisal?

A. I don't know what you would call it, but if I can try to explain it, Mr. Eddy got in touch with someone, from my understanding, Mr. Eddy got in touch with someone, and someone in the real estate and appraisal department of the Bank of America, and asked them to give him an opinion of what was a fair market price for the property.

Mr. Eddy reported back to the board of directors that he was informed by a person at the Bank of America that $75,000.00 was a fair market value.

And I agreed to sell it at a fair market value. Does that answer it? I am just getting a little bit tired, and I didn't hear that right.

Q. Did you testify earlier in this case that it was [301] not your corporation's policy to own land?

A. Whether I testified, I don't know. But I can answer that. It is not our policy.

Q. It is not the corporation's policy?

A. That's right.

Q. Do you recall Mr. Eddy testifying to the same effect? A. I believe so.

(Testimony of Joe Goldstein.)

Q. Were you in favor of your corporation's purchasing this property from you, the San Gabriel property? A. Oh, yes.

Q. How can you justify this, in view of the fact that the policy of the company is against the company's owning land?

A. Well, I'll tell you why. I now own a piece—my wife and I now own a piece of property that we paid $35,000.00 for. I am now receiving $800.00 a year rent on a $35,000.00 investment. Now, how long am I going to keep a $35,000.00 piece of property with a a $800.00 per year return, which happens to be approximately two and three-quarters percent return.

So, apparently, I wasn't going to keep that property very long. When my first thought is of the Boys Markets, it was offered to them at a fair market price. That happened— [302]

Q. Did you attempt to sell this property to anyone else?

A. Oh, of course not. I would first offer it to the Boys Markets. If I had offered it to anyone else, I am sure I would have received a lot more than $75,000.00.

Q. With a 42-year lease on this property?

A. You are right. There was no lease, now. I own it. I'm sorry. I said I could have sold the property— You are right.

Q. Thank you. I didn't think you were a lawyer, but I was beginning to wonder.

Was there any purpose for your corporation purchasing this property?

(Testimony of Joe Goldstein.)

A. They thought it would be a good idea.

Q. Would you care to explain in a little more detail what that means?

A. Well, if I was not involved personally, I would have recommended that our company buy it for $75,000.00.

Q. Even if you weren't involved personally?

A. Definitely.

Q. You did recommend that your corporation—

A. I say I would have, had I not.

Mr. Campbell: The question was why. Why was the corporation buying it? Why was it advantageous to the corporation, as I understood the question. [303]

The Witness: I am sorry. There is lots of reasons. Price was a fair market price. It would be more advantageous for the Boys Markets to own fee than it would to have a forty-some-year lease, for various reasons.

By Mr. Greaves:

Q. If this were true that it was advantageous to the company to own the fee, why was it against the company's policy to own the fees to land?

A. They tried, we tried, the company tried to buy this land on numerous occasions.

Now, I said it is not—I didn't say it is the company's advantage to own—not to own fees or to own fees. I am talking about real estate. There is a lot of difference in owning real estate and having a ground lease.

Q. We are talking about the ownership of real es-

(Testimony of Joe Goldstein.)

tate, which is legally referred to as a fee, one and the same thing.

A. You want to know why it is not advantageous for us to own real estate?

Q. No, I want you to reconcile, as a director of your corporation, how the policy of the corporation can be against owning the fees and yet having—owning property and yet in this transaction finding it advantageous to own the property?

A. Because we are involved in a ground lease at this particular property. [304]

Q. Didn't you state a few moments ago that the reason you wanted to sell this property was that it was a very unfavorable lease to the lessor, and an investment that returned only $800.00 a year?

A. Yes.

Q. That was very favorable to the lessee, was it not?

A. Oh, in some respects, but in others—they could use that money, they could use future financing when it became necessary and make a lot more money on their money than the return—

Q. Was this the reason for the corporation's purchase of this land? A. Would be my reason.

Q. As a director? A. Yes.

Q. Then why isn't it your company's policy to own land?

A. Because it is more advantageous to use that money that it would take to buy the land, to use it in our corporate activities.

Q. Why wasn't that true in this case?

(Testimony of Joe Goldstein.)

A. Well, I have tried to explain to you to the best of my knowledge, that was it. We do go in sometimes and are compelled to buy land.

Q. Was the corporation— [305]

Mr. Campbell: Did you finish that answer?

The Court: Let him finish his answer.

The Witness: I thought I was finished.

Mr. Campbell: You said you do it sometimes when you are compelled to buy land. I thought you weren't finished.

Mr. Greaves: Has he paused now?

Mr. Campbell: I am sorry.

By Mr. Greaves:

Q. Was your corporation compelled to purchase this property? A. No.

Q. That wasn't the reason in this case, was it? What reason was there for the purchase of this property?

A. Oh, there is numbers of reasons. It would improve their financial structure.

Q. Why isn't the company's policy to own land, then? That would also improve the financial structure?

A. No, it wouldn't.

Q. Is this so unique a lot?

A. No. The minutes will show you that we had two or three hundred thousand dollars of our money tied up in a building.

Q. What minutes?

A. Well, in some minutes. We have proof for that. [306] Here is the reason. We had two or three hundred thousand dollars tied up in a building on this land.

(Testimony of Joe Goldstein.)

Well, we would like to untie that two hundred-some-thousand dollars to use. As long as we are on the ground lease, we can not make that money available.

Does that clear it up?

Q. No, but I will drop it.

Have you and Mrs. Goldstein, either or both of you, sold other property to your corporation?

A. There is one piece that we sold, yes.

Q. In what year?

A. I can't remember the year.

Q. Before or after 1953?

A. Probably was before, must have been before. I know it was.

Q. Is it your testimony that it was before?

A. I am not sure.

Q. You can remember a great deal of detail with respect to other things. Can't you remember more?

A. Like what detail? Like what do I remember?

The Court: Let's not enter into an argument, gentlemen. Ask direct questions. Let's don't comment.

By Mr. Greaves:

Q. Do you recall what property this was?

A. Yes. [307]

Q. Do you recall where it was located?

A. Yes.

Q. Was it located in the greater Los Angeles area?

A. Yes.

Q. Was it property upon which the Boys Market had a building? A. No.

Q. Does the corporation still have that piece of property? A. Yes.

(Testimony of Joe Goldstein.)

Q. Does the corporation still use this piece of property? A. Yes.

Q. For what purpose? A. Parking.

Q. Can you tell us the location of this piece of property? A. It is Highland Park.

Q. Now, at the board of directors' meeting in which you have testified it was decided that the Boys Markets would purchase the San Gabriel property from you and Mrs. Goldstein for $75,000.00, in that meeting did you inform the other directors that under the lease with the Torley Land Company the corporation still had an unexpired term of 41 years and 10 months? [308]

A. I must have informed them that they had over forty-some years, yes.

Q. Did you tell the other directors that the corporation had the right to use that property as of December 1953 for another 41 years? A. Yes, sir.

Q. And 10 months? A. Yes.

Q. Did you also tell the other directors that the corporation would have only paid rent in the amount of $32,000.00 during that period?

A. Yes.

Q. And still it was decided by the directors that it should purchase this land for $75,000.00?

A. Why sure.

Q. Does your corporation still operate a store on that property? A. Yes.

Q. Do you believe you could have sold this property to any other person or corporation for $75,000.00?

Mr. Campbell: Objected to as immaterial.

(Testimony of Joe Goldstein.)

The Court: I will overrule the objection. He already testified to that.

Mr. Campbell: It is speculative and calling for his conclusion, if the Court please. [309]

The Court: Well, I think there is a question on the fair market value of the property. I think that probably his testimony would be both material and competent.

Mr. Campbell: I understood there was no question.

The Court: Pardon?

Mr. Campbell: I understood there was no question.

The Court: Well, that was what I understood in your opening statement. But I asked a question yesterday, and there seems to be some question of fair market value, both at the time the petitioner bought the property and at the time the corporation bought the property. So I would overrule the objection.

Answer the question.

The Witness: What was the question again, please?

(The question was read.)

The Witness: I don't know.

By Mr. Greaves:

Q. Now, Mr. Goldstein, I have just a few more questions. Referring to Exhibit 1-A in this case, which is yours and Mrs. Goldstein's individual income tax return for the year 1953, a photostatic copy of that, I direct your attention to Page 2 thereof, with particular reference to Schedule F, which is about midway down on the page, which is income from rents and royalties, and under Schedule F [310] I direct your attention to an item of ground rent, $400.00.

I wonder if you could tell me what this amount

(Testimony of Joe Goldstein.)

was? I wonder if you could tell me the source of that amount. A. Boys' purpose.

Q. For what purpose?

A. For the rental of the land at San Gabriel.

Q. For the rental of the land at San Gabriel?

A. Yes, for the rental of the property.

Q. When did you become the owner of that property?

A. I would have to refer to dates.

Q. December 8, 1953, when the deed was conveyed to you?

A. I don't think that would be the date, or I don't think I would be entitled to $400.00.

Mr. Campbell: Maybe I can help counsel out. There was a prorate of rents in the escrow, plus the balance of the term. I think I have a copy of the escrow statement here.

I have a copy of the escrow statement, which indicates on prorate rents there was paid to Joe and Lillian Goldstein the amount of $266.64 and appended also is, received, $133.36 from Boys Markets for November and December rent; proration having been of the six-month period, 5/1/53 to 11/1/53. Does that answer your question?

Mr. Greaves: Yes, it does; which escrow are you [311] referring to?

Mr. Campbell: I am referring to the escrow statement Escrow No. E 13965. This is not in evidence. This is a statement showing the disposition of funds.

Mr. Greaves: Thank you.

(Testimony of Joe Goldstein.)

Mr. Campbell: Can we stipulate? I will offer to stipulate—

Mr. Greaves: That is perfectly all right.

Mr. Campbell: —that the amount you referred to was from the proration of rents in connection with the acquisition of the property.

Mr. Greaves: Counsel will so stipulate.

Mr. Campbell: It does not appear on the face of those exhibits.

The Court: Yes, I understand.

By Mr. Greaves:

Q. Still looking at Exhibit 1-A, I note that in the capital gain and loss schedule which is attached—do you see that? It is the fourth page, I believe, of that return. Do you have that? A. Yes.

Q. I note that in the capital gain and loss schedule attached, you report an unused capital loss carryover of some $112,944.77, is that correct?

A. Where is that? [312]

Q. That is on the gains and loss from sales or exchanges of property, Schedule D.

A. Schedule D. What page?

The Court: I don't think it is necessary to ask this witness whether that is correct or not.

Mr. Greaves: I am just trying to ascertain whether he saw what I was referring to.

By Mr. Greaves:

Q. Which $112,000.00-plus is claimed as an unused capital loss carryover from prior years. Now, I wonder if you could tell me what the source or sources of this loss were?

(Testimony of Joe Goldstein.)

Mr. Campbell: I am going to object as immaterial, if the Court please. That is not in issue here. It has been stated by counsel not to be in issue, and it will take a long time going into this, I have no doubt.

The Court: What is the relevance of this?

Mr. Greaves: I am willing to strike that question, as I didn't realize how much detail it would be. If I may ask a couple of others, the relevance being that I am not sure yet.

The Court: He hasn't questioned the right to the carryover.

Mr. Greaves: I am curious as to the property involved, real property, stocks and bonds. [313]

Mr. Campbell: We can satisfy your curiosity out of court, if you like, but—

Mr. Greaves: Would you stipulate that?

Mr. Campbell: No, I see no materiality to it. I will not stipulate.

The Court: I see no relevance as of now. I will sustain the objection.

By Mr. Greaves:

Q. Did you incur capital loss in 1952?

Mr. Campbell: Objected to as irrelevant, if the Court please.

The Court: What is the object of this line of questioning, Mr. Greaves, as long as the capital loss carryover has not been questioned by the Government? That is my understanding. At least, I haven't seen that it is questioned. It is not a question of how much was used.

Mr. Greaves: Inasmuch as the issue in this case,

(Testimony of Joe Goldstein.)

that is, whether or not the petitioner had ordinary income or capital gain during 1953 on the sale of this property, I am attempting to ascertain whether at the time this entire manipulation came about the latter part of December, the first part of '53, it was motivated by a capital loss from the prior year that was carried over to 1953. This would explain some of the motivation.

The Court: Well, inasmuch as the testimony has [314] been that the original negotiations were started possibly in the latter part of 1952, I will let him answer this question. What you are trying to find out, I gather, is what time this carryover, the loss, the capital loss which gives rise to this carryover occurred?

Mr. Greaves: Yes, your Honor.

The Court: Can you answer that?

The Witness: I can answer it this way: There was no capital loss in '52.

Mr. Campbell: I didn't get that answer.

The Witness: There was no capital loss in 1952.

Mr. Campbell: In other words, it had occurred prior to '52?

The Witness: Yes.

By Mr. Greaves:

Q. During the year 1953 were you in the business of buying and selling real property?

A. I am not in that business.

Q. Were you in the business of constructing markets? A. In '53?

Q. Yes.

A. I don't remember whether we were building one then or not.

(Testimony of Joe Goldstein.)

Q. I am referring to you personally.

A. Oh, personally, no. [315]

Mr. Greaves: I have just two or three questions here with regard to your brother, Al Goldstein.

By Mr. Greaves:

Q. I believe on direct you stated that he is no longer with the Boys Markets? A. That's right.

Q. Was he with the Boys Markets in 1953?

A. Yes.

Q. Do you recall when he left the employment there?

A. The best I can recollect, it was just about two years ago. That would be 1958.

Q. Did the fact that he wasn't a stockholder in the Boys Markets have anything to do with his leaving?

A. No.

Q. I believe you testified yesterday that all the boys worked quite hard and earned bonuses in the employment of the Boys Markets, and with their money purchased stock from the corporation?

A. Right.

Q. Am I to assume from this that Brother Al didn't work hard and didn't get a bonus?

A. He worked very hard and he got his bonuses.

Q. But he didn't purchase any stock?

A. That's right.

Q. Just one more question: Did you attend the [316] conference alluded to during this trial by others of the witnesses? A. I'm sorry.

Q. Did you attend the conference in Mr. Campbell's office alluded to by other witnesses, referred to?

(Testimony of Joe Goldstein.)

A. Yes.

Q. Did anyone else appearing in this case appear at that conference? A. Yes.

Q. Did you request those individuals to attend?

Mr. Campbell: Just a minute. I am going to object to this. I see no purpose in this. These people are brothers. I will stipulate that I interviewed these people. I asked them to come to my office. I asked them what they knew about the facts of the case, and that is what it amounted to. I object to this as being immaterial and irrelevant.

The Court: I will sustain the objection.

By Mr. Greaves:

Q. As a final question, Mr. Goldstein, do you mean to tell the Court by all of your testimony in this case that you, the president of your corporation, the major stockholder, chairman of the board of directors, and a brother of four of the other directors, were willing to take advantage, not only of your corporation, but also your brothers in making [317] a profit in a transaction at their expense?

Mr. Campbell: I object to that question as argumentative, and an attempt to have the witness characterize his own testimony. The testimony will speak for itself. The question is irrelevant and incompetent, and compound, as well.

The Court: Yes. The question isn't in proper form. I think you have one assumption in it that there has been no evidence on at all, that he was willing to take advantage of the corporation. I will sustain the objection to the question in that form.

Mr. Greaves: I have no further questions at this time, your Honor, except insofar as after a break we can find the minutes of this December meeting or alleged December meeting of 1953, referring to the permission of the board of directors for their corporation to purchase this property from Mr. Goldstein and his wife.

The Court: All right. We will recess at this time until 2:00 o'clock, and I will instruct the parties to look at that minute book and find out whether there are any minutes in there that refer to the purchase price of this property by the corporation from Mr. and Mrs. Goldstein.

We will recess until 2:00 o'clock.

(Whereupon, a recess was taken until 2:00 o'clock, p.m. of the same day.) [318]

Afternoon Session

2:00 p.m.

JOE GOLDSTEIN

a witness called by and on behalf of the Petitioners, having been previously duly sworn, resumed the stand and testified further, as follows:

The Court: Do you have any further questions?

Mr. Campbell: Pardon me. I was going to state, your Honor, that during the recess we made inquiry concerning these minutes. Mr. Goldstein as president was subpoenaed to produce all minutes of the corporation reflecting upon these property transactions. Pursuant to that subpoena, he produced here the minute book of the corporation through the year 1953. I

(Testimony of Joe Goldstein.)

gather that he is now advised that there are no other minutes, or at least none that can be located, other than those which are produced here. Those which are produced here do not include any reference to an authorization by the board of directors for the purchase from Joe and Lillian Goldstein of the San Gabriel property.

Is that a fair statement?

Mr. Greaves: Excepting so far as there is an implication in that statement that such minutes do exist.

Mr. Campbell: Well, that I do not know. I simply asked that they produce all that could be found.

The Court: There will be no such implication on— [319]

Mr. Campbell: It is not intended to be an implication.

Mr. Greaves: I am just trying to recall the cross-examination of this witness as to one point, your Honor, and I can not recall whether we established one point, and therefore I would like to reopen cross-examination of this witness for one additional question.

The Court: All right.

Mr. Greaves: If I may have a moment to recollect.

Cross-Examination—Continued

By Mr. Greaves:

Q. In your negotiations with the Torley Land Company for the purchase of the San Gabriel property in exchange for property in Las Vegas, the value of which was $35,000.00, were you in any way compelled to enter that transaction? A. No.

(Testimony of Joe Goldstein.)

Q. Was the Torley Land Company, to your knowledge, in any way compelled to enter that transaction?

A. No.

Mr. Greaves: I think that is all, your Honor.

Mr. Campbell: I have just one matter, your Honor.

The Court: All right. [320]

Redirect Examination

By Mr. Campbell:

Q. Mr. Goldstein, I would like to straighten this out as to when a certain event occurred.

You testified on cross-examination that one time you went out to see the older Mr. Torley regarding the purchase of the property, at which time you had a cashier's check for, I believe, $35,000.00 with you, and a personal check for $50,000.00.

Would you state whether that was before or after the original lease, which has been introduced here as Exhibit 2-B, and which was executed in 1945; will you state whether the time you took those checks out there was before or after the execution of that lease?

A. Before.

Q. That was during, I take it, then, the course of negotiations during which I believe you stated that Torley did not desire to sell the property at that time but was willing to lease, is that correct?

A. That's correct.

Mr. Campbell: That is all.

Mr. Greaves: No recross.

The Court: As a matter of fact, I believe you testified that when Torley wouldn't accept these checks that

(Testimony of Joe Goldstein.)

you came out at that time with this lease, is that correct? [321]

The Witness: Oh, no, later, at another meeting.

Mr. Campbell: I wasn't sure whether that was clear or not or could be possibly confused with the later negotiations.

That is all, Mr. Goldstein.

(Witness excused.)

Mr. Campbell: The petitioners will rest, your Honor, subject, I might say, to checking the exhibits to make sure that they have all been offered and received in evidence. I won't take the time to do that at this point.

The Court: Mr. May, do your records indicate that all the exhibits offered have been received in evidence?

The Clerk: That is correct, your Honor, Petitioners' Exhibits numbered 5 through and inclusive of 10. They are in evidence.

Mr. Campell: Very well. Petitioners will rest, your Honor.

The Court: Mr. Greaves?

Mr. Greaves: With respect to the exhibits, your Honor, I do not recall whether we have these minutes of the board of directors in evidence as exhibits.

Mr. Campbell: No, they are not. They were read into the record, rather than put the entire book into evidence.

Mr. Greaves: Would copies of these two [322] particular board of directors' meeting minutes be helpful to the Court?

The Court: Well, I thought of suggesting that some

time ago. As it turns out, those paragraphs, the one, must have been read into this record at least ten times.

Mr. Greaves: I think if we could have referred to the document without having to read it, it would have been simpler. I wonder now if it would simplify matters for the Court to have these submitted as exhibits?

The Court: No reference has been made to any of the other contents of the minutes of those two meet ings. Unless there is some desire on the part of either party to get other parts of those minutes in, I don't think it would make any difference to me one way or the other at this time.

Mr. Greaves: It would be helpful to respondent, your Honor, if these minutes could be introduced, inasmuch as there was testimony as to their form, entered into in this case.

Mr. Campbell: I have no objection—I presume counsel for the Government will have the photostats made?

Mr. Greaves: Will these also be counsel for the Government's exhibits?

Mr. Campbell: Yes, if you like.

The Court: Well, I think that you were offering the minutes, and to save time we were simply reading that [323] small portion into the record. I think they would still be considered your exhibit.

Mr. Campbell: The reason I say that is, photostating with me is a considerable problem, because it depends upon commercial photostaters, and we have an objective, I believe, of having all these exhibits completed and back in the Court's hands before the Court ends its session here, while the Government has photostatic equipment available and available in this building.

The Court: Can you have the minutes of those two meetings photostated?

Mr. Greaves: I can, your Honor. I can not, however, guarantee I can get them back by Friday, administrative process being what it is, and due to the case starting Monday, that is going to involve multitudinous documents—

Mr. Campbell: Possibly we can solve the problem. This is a looseleaf minute book. Perhaps we can extract these two minutes and file them with the Court.

The Court: Yes, they can be returned to the petitioner. So I suggest, if you would like to have those minutes in evidence, that we mark the minutes of the meeting of January 27, 1953 of the board of directors of the corporation as Petitioners' Exhibit 11, and the minutes of the board of directors' meeting of April 28, 1953 as [324] Petitioners' Exhibit 12, and they will be received in evidence.

The Clerk: Petitioners' Exhibits 11 and 12.

Mr. Greaves: No objection.

(Petitioners' Exhibits Nos. 11 and 12 were marked for identification and received in evidence.)

Mr. Campbell: Now the petitioner rests, your Honor.

Mr. Greaves: Would the Clerk please call Mr. Torley?

Whereupon,

RAY E. TORLEY,

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

(Testimony of Ray E. Torley.)

The Clerk: Would you state your name and your address, please?

The Witness: Ray E. Torley, 411 South 13th Street, Las Vegas, Nevada.

The Clerk: Thank you.

Direct Examination

By Mr. Greaves:

Q. Mr. Torley, what is your present occupation?

A. Secretary of the Torley Land Company and handling rentals; we have a number of units in Las Vegas. [325]

Q. How long have you been associated with the Torley Land Company? A. Since 1936.

Q. Do you own stock in this company?

A. That's right.

Q. Are you familiar with either of the petitioners in this case, that is, Joe Goldstein, who appears before you, or his wife, Mrs. Lillian Goldstein?

A. I know Mr. Joe Goldstein.

Q. Prior to your appearance at this court on Thursday, January 21, 1960, had you known any of Mr. Goldstein's brothers?

A. No, I hadn't. I had never met them.

Q. Would you tell us when you met Mr. Goldstein?

A. Mr. Joe Goldstein?

Q. Mr. Joe Goldstein, yes.

A. Oh, I have known Mr. Joe Goldstein since '45, I'd say, '44, '45.

Q. Can you tell us the circumstances under which you met Mr. Goldstein?

(Testimony of Ray E. Torley.)

A. Oh, I knew him through the market business, for one thing, and through the property, Del Mar property.

Q. Pardon me?

A. Through the Del Mar property, Mr. Goldstein wished to lease it, and I knew him through that. [326]

Mr. Greaves: For the record, the Del Mar property, I believe—let me rephrase this.

Mr. Campbell: I will stipulate it is the property that is in issue here.

Mr. Greaves: I wanted the record to be clear.

By Mr. Greaves:

Q. Under what circumstances with respect to this property did you meet Mr. Goldstein, Mr. Joseph Goldstein?

A. Well, like I have mentioned, he wished to lease the property for a market.

Q. Did you negotiate this lease with Mr. Goldstein?

A. I didn't, no, sir. My father and an attorney in Los Angeles handled the matter.

Q. Are you familiar with these negotiations by virtue of your position?

A. Part of it I was, yes, before it was signed. But practically all of the negotiations were handled through Mr. Goldstein and Mr. Eddy and our attorney.

Q. Do you recall the year in which Mr. Goldstein and your father held such negotiations?

A. I'd say it was the latter part of '44, early '45.

Q. I will now show you Exhibit 2-B in this case, Mr. Torley, and aks you if you are familiar with this document? You can just glance at it briefly.

(Testimony of Ray E. Torley.)

A. Yes, sir. That's the 1945 lease of the Del Mar [327] property.

Q. Do you recall the exact date that this lease was executed?

A. No. It was in '45, whatever it mentions here. I don't recall.

Q. Would you state that date, please?

A. 27th of September, it says here. I don't remember the exact date.

Q. And the year?

A. 1945. That's the correct year, I know.

Q. Do you recall by virtue of your position as an officer in the Torley Land Company who initiated negotiations for this lease?

Mr. Campbell: Objected to as calling for hearsay on his part. He stated that he had no part of the negotiations.

The Court: Well, I think the question may be repetitious, but he is asking him whether he knows who initiated it in behalf of the Torley Land Company, is that it?

Mr. Greaves: Yes.

The Court: I will overrule the objection.

The Witness: I am sorry. I don't recall. I think it was between Mr. Goldstein and my father, but I couldn't say, truthfully.

The Court: The portion of the answer as to what he thinks is not responsive and will be stricken. He said [328] he didn't know.

By Mr. Greaves:

Q. As an officer in the Torley Land Company, do

(Testimony of Ray E. Torley.)

you know whether Mr. Joe Goldstein offered to purchase this San Gabriel Del Mar property?

A. You mean after the lease was signed?

Q. Well, first, after the lease was signed?

A. He had made an attempt to buy it, yes.

Q. Prior to the time the lease was signed?

A. No.

Q. You do not know of any such?

A. No, he never made any attempt, to my knowledge to buy it.

Q. As an officer of your corporation, do you know why his lease did not contain a renegotiation clause?

A. No.

Mr. Campbell: Objected to as immaterial, your Honor. We have the lease. The lease was entered into. Why it did or did not contain provisions of that kind, I submit, is immaterial to the issues before this Court. Also, calls for the conclusion of this witness, who did not participate, according to his testimony, in the negotiations.

The Court: I think that the testimony might be material, but I doubt if this witness is going to be able to answer it, in view of his previous testimony, unless later [329] he became aware of why such clauses were not put in there.

Can you answer the question?

The Witness: No, I'm sorry. The lease, as I mentioned before, was drawn up by our attorney, and he handled the whole matter.

By Mr. Greaves:

(Testimony of Ray E. Torley.)

Q. What did this lease cover, specifically, was this an improved parcel of real estate?

A. It was unimproved.

Q. Was there any building at all on this property?

A. As I recall, there was an old house which was torn down, and a small restaurant, just a little eating place, probably five or six stools.

Q. Do you recall when these buildings were torn down?

A. No, I don't remember the exact date. It was prior to the time they started their market; whatever the date in there—

Q. Subsequent to the date of the lease?

A. Yes. It was after the date of the lease.

Q. Do you know whether the Boys Market occupied either of those buildings?

A. No, they didn't.

Q. Do you recall when the improvement erected on this property—

A. I don't remember the exact date. [330]

Q. Do you recall the year?

A. No, I don't.

Q. During the period the Boys Markets, the limited partnership, was the lessee of the property, did you as an officer of the Torley Land Company have occasion to discuss the matter of this lease with anybody representing the Boys Markets?

A. In what regard?

Q. In any regard.

A. Not to my knowledge.

(Testimony of Ray E. Torley.)

Q. You did not discuss this lease with anyone representing the Boys Markets? A. No.

Q. Did you discuss this lease with anyone representing the Boys Markets, a corporation?

A. No, not the lease.

Q. You have never had any discussion. Have you had other discussions with members of the directors of the corporation or partners in the limited partnership?

A. It is the only one I mentioned in regard to the sale of the property, Mr. Goldstein.

Q. He is the only one representing, or the only one from these companies that you have had contact with?

A. In regard to the lease, that's correct.

Q. As an officer of the Torley Land Company, did [331] you have any objection to the assignment of the lease from the Boys Markets, the limited partnership, to the Boys Markets, Incorporated?

A. No.

Q. At the time you learned of this lease assignment, did you as an officer of your company have any concern that there might be defaults?

A. No. As I recall it, I turned that over to my attorney, also, and he handled it.

Q. In any discussions you had with Mr. Goldstein prior to the time he purchased this property from the Torley Land Company, did he ever discuss the possibility of his corporation purchasing this property?

A. Well, as I recall it, it was always that, "We'd like to buy the property," which I presumed was the corporation. I didn't know. It might be the cor-

(Testimony of Ray E. Torley.)

poration or he and his wife or who it would be—it was, "We need the property."

Q. Do you recall when negotiations were commenced for the exchange of this San Gabriel property and a property in Las Vegas?

A. In '53, about in June of '53, as I recall it.

Q. That is the time that the escrow agreements were signed? A. That's right. [332]

Q. Now, were there negotiations preceding the execution of those agreements?

A. Well, not to my knowledge, no.

Q. Your father conducted those negotiations, as well? A. Well, I couldn't say on that.

Q. You have no present recollection?

A. No, I don't have any.

Q. Do you know who initiated the idea of an exchange of properties?

Mr. Campbell: Objected to as calling for hearsay upon his part, if the Court please.

The Court: Ask him first if he knows. He can answer that.

The Witness: Well, I don't know, to be positive. If Mr. Goldstein talked to my dad on it, so—

The Court: Do you know?

The Witness: No, no, I don't.

By Mr. Greaves:

Q. You stated a few moments ago that Mr. Goldstein did make an offer or offers to purchase this property from the Torley Land Company, is that correct?

A. That's correct.

(Testimony of Ray E. Torley.)

Q. And this, I believe you further testified, was after the date of the execution of this lease?

A. That's right. [333]

Q. Exhibit 2-B. Did you have any part in determining whether Torley Land Company should or should not accept these offers of purchase made by Mr. Goldstein? A. I did.

Q. Did you have any conversation with Mr. Goldstein relative to these offers of purchase?

A. Well, it was really only one, one time he wanted to buy it, and I quoted him a price, and he thought it was too high, and that's as far as we got on it.

Q. Can you recall the approximate date?

A. I don't recall it.

Q. Do you recall the year?

A. I would say it was about in '47, but I am not positive about that, possibly '46 or '47.

Q. To your knowledge, after that time—

A. It was after the lease, yes.

Q. From your knowledge, after that date, that is, approximately 1947 and up to 1953, no further offers were made to the Torley Land Company by Joe Goldstein? A. Not to me, no, sir.

Q. At the time that Mr. Goldstein made an offer to you for the purchase of this property, did he give any indication of why he wanted this property?

Mr. Campbell: If the Court please, I am confused. Are we talking about 1947 now? [334]

Mr. Greaves: As to an offer made in 1947, yes, sir, approximately 1947.

The Witness: Well, to the best of my recollection,

(Testimony of Ray E. Torley.)

Mr. Goldstein told me he wanted the property for loan purposes, that they could borrow more money if they owned the land. That's all I have a recollection of.

By Mr. Greaves:

Q. Do you recall what offer he made to you at that time?

A. No, he didn't make any offer at that time.

Q. No dollar amount? A. No.

Q. Did you ask a price for the property?

A. Yes.

Q. Do you recall the approximate amount of that?

A. I asked $40,000.00.

Q. $40,000.00. This was in approximately 1947?

A. Around that, yes.

Q. Between this date in 1947, at which time you asked $40,000.00 for the San Gabriel property, and the time your company exchanged properties with Mr. Goldstein, had your company attempted to sell this property to other parties? A. No, sir.

Q. Did your corporation consider this a desirable lease? [335]

Mr. Campbell: Objected to as immaterial, what they considered it to be, if the Court please. We are faced with the lease as it existed.

The Court: I don't see much materiality. However, I will let him answer the question.

The Witness: What was the question, again?

By Mr. Greaves:

Q. Did you consider the lease under which the Boys Markets held the San Gabriel property a desirable lease?

(Testimony of Ray E. Torley.)

A. When do you mean, in '45 or later on?

Q. Well, I would suggest that if the view had changed that you so state.

A. When the lease was written, we thought it was a good one; '53 it wasn't. The dollar value wasn't there and the lease was a 50-year lease, so $800.00 a year wasn't very much income.

Q. In '47 did you consider this a good lease?

A. Not very, no.

Q. For the period '50 to '53 it declined?

A. We figured it had.

Q. In its merits and benefits, as far as the Torley Land Company was concerned?

A. That's right.

Q. Can you tell us, then, why your company did not attempt to sell this property? [336]

Mr. Campbell: Objected to, if the Court please, as immaterial and irrelevant, insofar as the issues here are concerned.

The Court: I will overrule the objection.

The Witness: Well, the reason is, on a 50-year lease with an $800.00 income it is impossible to sell it for $40,000.00. The returns weren't enough, for $40,000.00.

By Mr. Greaves:

Q. So you didn't even attempt to sell it?

A. No.

Q. Did you state that all the negotiations with respect to the sale of this property were held between Mr. Goldstein and your father, insofar as you know?

(Testimony of Ray E. Torley.)

A. As far as I know, it was held between Father and Mr. Goldstein, and Father talked to me on it.

Q. But you had no personal dealings?

A. I don't recall having any.

Q. With Mr. Goldstein?

A. I don't recall having any personal with him, no.

Q. Did the Torley Land Company desire to rid itself of the San Gabriel property?

A. For income purposes, yes.

Q. Would you care to explain that?

A. Well, as I said, it was an investment we figured was worth $40,000.00, and $800.00 wasn't enough to talk about [337] over a period of 50 years. If that could be invested in other rental property, it could be a bigger income.

Q. Did Torley Land Company desire to have rental property in Las Vegas? A. That's right.

Q. Would Torley Land Company have accepted rental property in any other community?

A. I couldn't say on that.

Q. You are a director of the Torley Land Company?

A. Yes, but I wouldn't know. It all depends on what the property was.

Q. Would you as a director of your company have refused an offer of an exchange of property in some other location?

Mr. Campbell: I am going to object. That is speculative, because it includes many things. Even though you wanted your property in one place, if you had a

(Testimony of Ray E. Torley.)

tremendously attractive offer, wherever it might be, you might accept it.

The Court: I sustain that. He said before it would depend on the circumstances at the particular time, and the place, and everything else.

By Mr. Greaves:

Q. In 1953 where was your residence?

A. 1953? Alhambra, California. [338]

Q. Where was your father's residence?

A. Las Vegas.

Q. To your knowledge, was your father interested in getting property, receiving or purchasing or exchanging, in any manner, getting property in Las Vegas?

A. No, not to my knowledge, he wasn't too interested in it.

Q. Was your father active in the business in 1953?

A. He was 75 then, and he hadn't been active since '35.

Q. Yet he conducted all the negotiations for this property?

A. He talked, yes. He met Mr. Goldstein more than I did and then spoke to me about it.

Q. I wonder if you could speak up just a little bit.

A. He had met Mr. Goldstein considerably more than I had and knew him better.

Q. Why was that?

A. Well, maybe we shouldn't bring it up in here, but he met him at the races quite a few times. Dad liked the races and consequently they met.

Q. As a director of your corporation, were you

(Testimony of Ray E. Torley.)

interested in exchanging your San Gabriel property for tax advantages?

A. No, not for tax advantages, it wouldn't mean [339] anything to us.

Q. And your corporation then in exchanging properties was merely desirous of getting rid of a piece of property that no longer justified the investment by virtue of its income?

Mr. Campbell: Object to that question as calling for his conclusion, because it refers to what the corporation desired. I think this witness can only speak as to his own intentions or desires at that time.

The Court: I believe he has testified he was an officer and director of the corporation.

Mr. Campbell: As an officer and director, he can state, I believe, your Honor, what his own intentions or desires were, but he can not speak for the other officers or directors of the corporation.

The Court: All right. Limit it to his own thoughts as an officer and director of the corporation.

Mr. Greaves: May I direct some preliminary questions to this witness?

The Court: Yes.

By Mr. Greaves:

Q. You say your father retired, to all intents and purposes, in 1935?

A. That's in the market business, yes. We were in the grocery business. [340]

Q. But he was still active, or, rather, he was still active in '53 insofar as the Torley Land Company's real estate interests were concerned?

(Testimony of Ray E. Torley.)

A. That's correct.

Q. Was your father also a member of the board of directors? A. Yes.

Q. And a stockholder? A. That's right.

Q. Were there other members of the board of directors and stockholders?

A. There is one other member but he is not a stockholder.

Q. There were three directors and two stockholders? A. That's right.

Q. As a director of your corporation, were you interested in gaining any tax advantage for your corporation in this exchange of San Gabriel property for the Las Vegas property?

A. Well, as I mentioned before, I was interested in the extra income, and if there was any tax angle to it I was interested in trading it.

Q. So that the fact that this would or would not have been a tax-free exchange would have made no difference to you, as a director of your corporation? [341]

A. I wouldn't say that, no. If you can save the tax, why, in an even trade, and get a larger income, why, we would be interested. If we would have had to pay a tax on it, we probably wouldn't have sold it.

Mr. Campbell: May I have the answer, please?

(The answer was read.)

The Witness: That's on a gain, I mean.

By Mr. Greaves:

Q. Did your corporation's board of directors have

(Testimony of Ray E. Torley.)

any meetings with respect to the exchange of properties? A. Yes, we had one.

Q. You say you had one? A. Yes.

Q. Did you attend that meeting?

A. Yes, I did.

Q. Was the matter of this exchange discussed at that meeting?

A. Yes. As I recall, that was in November '53, and it was discussed about exchanging the properties.

Q. In what month? A. In November '53.

Q. As a matter of the board of directors of your corporation, when did you first learn that the exchange of properties would result in your receiving land and improvement in Las Vegas worth $35,000.00? [342]

A. Well, that's when we went to escrow, in June of '53. That was put in escrow.

Q. You stated earlier that you had asked Mr. Goldstein for $40,000.00 for the San Gabriel property?

A. We had at one time, yes.

Q. At a prior time? A. Prior to that, yes.

Q. At the time you learned that you were exchanging your San Gabriel property for other property in Las Vegas worth $35,000.00, what was your reaction?

Mr. Campbell: Objected to as immaterial and irrelevant, if the court please.

The Court: It may be material, have some relevance. I will overrule the objection.

The Witness: What was that question, again?

Mr. Greaves: Would you read the question?

(The question was read.)

(Testimony of Ray E. Torley.)

The Witness: Well, as I mentioned, I thought it was a goood deal for the extra income.

By Mr. Greaves:

Q. As a director of your corporation, you thought that $35,000.00 was a reasonable price for this property? A. That's right.

Q. Was this view of yours based in any part upon the fact it was a 42-year lease on this property at that time? [343]

Mr. Campbell: I am going to object to leading and suggestive questions.

The Court: Yes, that is quite leading.

Mr. Campbell: Having done the same to me.

The Court: Sustain the objection to that question.

By Mr. Greaves:

Q. What effect do you believe the lease on that property had on its value? A. What is that?

Q. What effect do you believe that the lease existing on the San Gabriel property had on its value?

A. For the period of the loss I think it hurt it.

Q. In 1953 how long a period under this lease remained? A. Forty-two years to go.

Q. And there was no re-negotiation clause in this lease?

A. I don't believe so. I couldn't say without reading it.

Mr. Greaves: I wonder if I might have Petitioners' Exhibit 8, which are the three escrow agreements?

By Mr. Greaves:

Q. Mr. Torley, I now show you Petitioners' Exhibit 8, which is in evidence in this case, and ask you

(Testimony of Ray E. Torley.)

if you are in any wise familiar with these, in your corporate capacity? [344]

A. Yes, I am.

Q. And are these the documents that represent the transaction in which the Torley Land Company exchanged the San Gabriel property for a Las Vegas property? A. They are.

Q. Do you recall when these escrows were entered? A. June of '53.

Q. Do you recall when these escrows were closed?

A. Closed, I believe, in August.

Q. I beg your pardon?

A. I believe it was in August. I am not positive.

Mr. Campbell: If the Court please, I don't think there is any issue. The records here show it was closed as of December 8th, when the title was passed, as shown by the policy of Title Insurance. If we have no issue—

The Court: Yes, that is my understanding of it.

Mr. Campbell: I think possibly we are asking the witness for something he couldn't recall but which the documents here show.

By Mr. Greaves:

Q. Do you have any knowledge when Mr. and Mrs. Goldstein purchased the property in Las Vegas?

A. June, I believe. I am not positive about that now. I wouldn't want to say for sure.

Q. The escrows were opened in June of 1953 and closed [345] in December of 1953. To your knowledge, did the Torley Land Company receive rent under the lease during that period on the San Gabriel property?

(Testimony of Ray E. Torley.)

A. I am not sure about that. I believe at the time the escrow was signed the rent stopped, but I am not positive.

Q. Did you know that on December 31st the Goldsteins sold this property to their corporation for $75,000.00? A. No. I did not.

Q. To your knowledge, had your father ever reneged on a business deal with Joe Goldstein?

A. Not that I know of.

Mr. Greaves: I believe that is all, on direct.

Mr. Campbell: Just one or two questions, if the Court please.

Cross-Examination

By Mr. Campbell:

Q. Mr. Torley, as a matter of fact, your father is still active, is he not?

A. In what respect? In the corporation, you mean?

Q. He is still active in the management of his business affairs? A. Oh, yes, that's right.

Q. Even at his advanced age? A. Yes.

Q. And I take it when you say "retired" you mean [346] he retired from the active retail grocery business? A. That's correct.

Q. Now, with regard to this corporation, the Torley Land Company, what proportion of the stock of that corporation was owned by your father in 1945 and in 1953?

A. I couldn't say that without looking it up.

Q. Did he own more than half of the shares?

A. I believe he did at that time, yes.

(Testimony of Ray E. Torley.)

Q. Do you recall what your ownership was?

A. I think I had about 45 percent, if I recall.

Q. And the balance was in your father?

A. That's right.

Q. And, as a matter of fact, this is true, is it not, that your father during 1945 conducted all of the negotiations relative to the sale of land or the acquisition of the other land?

A. I think part of it was in '45, yes.

Q. And it is true, is it not, that in regard to this transaction had in 1953 all of the negotiations right up to the time that you signed the escrow instructions were carried on by your father?

A. That's correct.

Q. And you signed the escrow instructions, did you not, by reason of the fact that the escrow was held in California and you were living in California at that time? [347]

A. Yes. We put them in the bank in Ontario.

Q. Close to your residence? A. That's right.

Q. As a matter of convenience, was it not? Now, referring back to the fact that in 1947 as to the one negotiation that you had with Mr. Goldstein, where you set up a price of $40,000.00, was that a firm offer that you made?

A. Well, as I recall that, Dad and I were playing golf down at Montebello—

Q. Can't you answer the question "Yes" or "No," whether it was a firm offer or was not a firm offer?

A. I told him we wanted $40,000.00 for the property.

(Testimony of Ray E. Torley.)

Q. Was that a firm offer?

A. It was there; if he'd have given the forty, we would have went to escrow on it.

Mr. Greaves: I believe he has answered that question. Why badger him?

Mr. Campbell: I am not attempting to badger him.

The Court: That is cross-examination. I don't think he is badgering him anyway.

Mr. Campbell: I think Mr. Torley can take care of himself.

By Mr. Campbell:

Q. Incidentally, at the time of this exchange of properties, what was the basis of the property in San Gabriel [348] on your books?

A. Well, I have the correct figure on that right here, rather than guess at it. If you would like to enter this—

Q. Yes.

A. I have a letter from my auditor here. $10,422.00, that was on the books.

Q. And at what date, how long had that been the cost basis?

A. We obtained the property in about '37, as close as I can recall.

Q. Was that $10,400.00 a depreciated figure or was that the cost?

A. No, that was land, that was what it cost us.

Q. In other words, you did not ever consider it as the purchase of an improved property, I take it?

A. No.

(Testimony of Ray E. Torley.)

Q. And that was the cost in the beginning and the cost you carried right on through in your books?

A. Yes.

Q. So that the apartment house which you are now carrying on your books, which you obtained in this exchange, I take it, you are also carrying at a cost basis before depreciation?

A. That's right, same figure. We are carrying the [349] building at eight thousand, three hundred and the land at two thousand. So it is the same figure.

Mr. Campbell: That is all.

The Court: Redirect?

Mr. Greaves: No, your Honor.

The Court: Thank you, Mr. Torley. You are excused.

(Witness excused.)

The Court: Is there any need to hold this witness?

Mr. Campbell: No, sir.

Mr. Greaves: No. I believe, your Honor, we can conclude at this time.

The Court: The respondent rests?

Mr. Greaves: Yes.

Mr. Campbell: We have no rebuttal.

The Court: All right, gentlemen, the case then will be submitted. Have you any desire to argue it orally at this time?

Mr. Greaves: I have no such desire, sir.

Mr. Campbell: If your Honor is going to take it on briefs, I can see no purpose to argue at this time. It should be better stated in the briefs, I think.

The Court: All right. What is your preference as

to whether the briefs be filed simultaneously or seriatim? [350]

Mr. Campbell: I would prefer simultaneous briefs, your Honor.

Mr. Greaves: Well, I would prefer seriatim briefs.

Mr. Campbell: That is par for the course on both of us.

The Court: Well, inasmuch as this is pretty much of a factual case, I think I will make them seriatim, unless there is some good strong reason that—

Mr. Campbell: No, your Honor, except for the fact that, which I don't anticipate, the decision is against the taxpayer, the matter of interest, of course, is running on at a substantial amount.

The Court: Well, we will make the briefs be filed seriatim.

Petitioners' original brief—how much time do you think you will need?

Mr. Campbell: It will require 15 days for the reporter's transcript. Sixty days, your Honor.

The Court: Petitioners' original brief will be due in 60 days from now, which will be—

The Clerk: March 22nd, your Honor.

The Court: March 22nd. How much time do you want for your answering brief?

Mr. Greaves: I can see our reply brief is going [351] to come at a very inopportune time. We have calendars both in March and April. I would say the customary amount of time for reply, your Honor, whatever you feel that should be.

The Court: Normally, we would give 30 days for answering brief.

Mr. Greaves: That is sufficient.

The Court: Is that sufficient?

Mr. Greaves: Yes.

Mr. Campbell: I might state this, your Honor: Falling on March 22nd, I would have to do it prior to that time, because I am commencing a long trial on March 8th here in this courthouse, which will take a long time to try, so that if I may have that time, if the Government's brief is to follow mine by 30 days —but if it is to extend beyond, whether I get mine ahead of time or not—

The Court: I think we would probably have to give the Government a date certain, which would normally be 30 days after March 22nd.

Mr. Campbell: Then will your Honor move my time up to March 8th?

The Court: All right. We will change the Petitioners' original brief then to be due on March 8th; respondent's answering brief will be due 30 days thereafter.

The Clerk: April 7, your Honor. [352]

The Court: April 7th.

Mr. Campbell: May I have 15 days?

The Court: Fifteen days for the reply brief.

The Clerk: April 22nd, your Honor.

The Court: 22nd.

The Clerk: That will be 15 days.

The Court: All right, gentlemen, if there is nothing further, then, the case will be submitted.

(Whereupon, at 3:00 o'clock, p.m., Friday, January 22, 1960, the hearing in the above-entitled matter was closed.) [353]

JOINT EXHIBIT 2-B

LEASE

This Indenture of Lease, made this 27th day of September, 1945, by and between Torley Land Company, a corporation, hereinafter designated as Lessor, and The Boys' Market, a Limited Copartnership, consisting of Joe Goldstein, General Partner, and Edward Goldstein, and Joe Goldstein as Trustee for Max Goldstein, Limited Partners,

* * * * *

21. Nothing in this indenture contained shall be construed to prevent the Lessee from encumbering its leasehold interest by mortgage, pledge or trust deed; but the rights of any mortgagees, pledgee, trustee, bondholder or beneficiary, shall at all times be subject to the rights of the Lessor to exercise any of the rights, options or remedies in this lease or by law provided, including the right to terminate this lease in case of default as herein provided, and shall in no wise alter, affect or diminish the reversionary interest of the Lessor herein. And no act of the Lessee hereunder shall in any wise encumber the Lessor's title or reversionary interest hereunder.

* * * * *

PETITIONERS' EXHIBIT 9

NOTE AGREEMENT

This Agreement dated as of ~~September~~ Oct. 1, 1950, by and between The Boys' Market, Inc., a California corporation (hereinafter sometimes called the "Company"), as Borrower, and Provident Mutual Life Insurance Company of Philadelphia, a Pennsylvania corporation, (hereinafter sometimes called "Provident"), as Lender, Witnesseth That:

1. Amount and Terms of Loan. The Company agrees to borrow from Provident and Provident agrees to lend to the Company, upon the terms and conditions hereinafter set forth, the sum of $400,000. The loan shall be evidenced by ten (10) promissory notes (hereinafter sometimes called the "Notes") of the Company in the principal amount of $40,000 each, dated ~~September~~ Oct. 1, 1950 and maturing serially on ~~September~~ Oct. 1 of each year beginning ~~September~~ Oct. 1, 1951, to and including ~~September~~ Oct. 1, 1960, and bearing interest from ~~September~~ Oct. 1, 1950 at the rate of four per cent. (4%) per annum payable semi-annually, the first such interest payment to be made on ~~March~~ Apr. 1, 1951. Each Note shall be payable as to principal and interest and premium in

such coin or currency of the United States of America as at the time of payment is legal tender for public and private debts, shall be subject to repayment as provided herein, shall be issued under and subject to the terms and conditions of this Agreement, and shall be substantially in the form attached hereto as Exhibit "A."

2. Security for Notes. As security for the payment of the principal, interest and premium, if any, of the Notes, the Company will at the time of the delivery of the Notes (herein called the "Closing") deliver to Provident a Mortgage (hereinafter called the "Mortgage") naming Provident as mortgagee and in substantially the form of mortgage hereto attached marked Exhibit "B", which Mortgage shall at the time of Closing be a lien upon all real estate and fixed property included in the Company's office and store property at 5531 Monte Vista Boulevard, Los Angeles, California, and upon the Company's leasehold interest in premises 120 East Valley Boulevard, Los Angeles, California, subject to no prior liens or encumbrances upon the Company's interest except, in the case of the property on Monte Vista Boulevard, the lien of the Deed of Trust referred to in paragraph 6(b) hereof. The Mortgage shall be held by Provident as custodian for the holders of the Notes as their interest may appear. The lien of the Mortgage shall be released at the earliest date when both (a) the unpaid principal amount of the Notes is less than $250,000 and (b)

the Company is not in default under any provision of this Agreement.

* * * * *

6. Negative Covenants of the Company. The Company covenants and agrees that until such time as all of the Notes and interest thereon have been paid in full the Company will not, without the written consent of the holders of 75% of the Notes at the time outstanding, do any of the following:

(a) Create, assume, incur or in any manner be or become liable, directly or indirectly, for any indebtedness to any person or persons for money borrowed, other than (i) the Notes, (ii) secured indebtedness not violating subparagraph (b) or subparagraph (c) hereof, and (iii) unsecured bank loans maturing in less than one year provided that (x) the aggregate of all such bank loans at any one time outstanding shall not exceed $200,000 increased to $400,000 by amendment of 8-26-55 and (y) for thirty (30) consecutive days in each fiscal year no such bank loans shall be outstanding.

Admitted in Evidence Jan. 22, 1960.

PETITIONERS' EXHIBIT 12.

MINUTES

Regular Meeting
Board of Directors
of
The Boy's Market, Inc.

Held on April 28, 1953, at 2:00 P.M. at 5531 Monte Vista Street, Los Angeles, California.

Present: Joe Goldstein, Edward Goldstein, Max Goldstein, Albert Goldstein, Bernard Goldstein, Lillian Goldstein, and Everett L. Eddy.

The meeting was called to order by President, Joe Goldstein.

Minutes of previous meeting read and approved. The President asked for a discussion of business for the first quarter of 1953. The Treasurer reported that the net profit for the quarter had been $33,851.49. This was a little disappointing but the gross profit was about one and a half percent less than ordinarily. However, it was anticipated that profits remaining during the three quarters of the year would be somewhat higher and the Treasurer estimated that the net profit for the year before income taxes should be about $300,000.

The President then reported that the plans for the remodeling and widening of the Highland Park Market were nearing completion, and that negotiations for a loan had been opened up with the John M. C. Marble Company, who are local agents for Provident Mutual

Life Insurance Company, and a loan is being asked for in the sum of $150,000.00. Out of this $150,000.00, proceeds from the loan, the present indebtedness on the property in Highland Park would be paid, which would leave approximately $130,000 to $135,000 available to cover the cost of remodeling and a portion of the cost of the fixtures.

The Treasurer reported that the $200,000.00 bank loan which was owing at the first of the year, had been paid, and that at this time there were no commercial loans owing by this company.

At a previous meeting, there was a discussion about the possibility of purchasing the land on which the San Gabriel Market was located. It has now been decided that Joe Goldstein and Lillian Goldstein would buy this land as their private property, and they may at some time in the future, sell it to The Boy's Market.

There being no further business to come before the board, it was then moved, seconded, and carried that the meeting be adjourned.

JOE GOLDSTEIN,
President

Attest:
EVERETT L. EDDY
Secretary.

Admitted in Evidence Jan. 22, 1960.

[Endorsed]: No. 17318. United States Court of Appeals for the Ninth Circuit. Joe Goldstein and Lillian Goldstein, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Petition to Review a Decision of the Tax Court of the United States.

Filed: March 28, 1961.

Docketed: April 8, 1961.

/s/ FRANK H. SCHMID,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

JOE GOLDSTEIN and LILLIAN GOLDSTEIN,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY

Appellants, Joe Goldstein and Lillian Goldstein, hereby state that the points upon which they intend to rely on the appeal in this action are as follows:

(1) The Findings of Fact, Conclusions of Law and Decision of the Tax Court of the United States are not supported by the evidence.

(2) The Decision of the Tax Court of the United States is contrary to law.

(3) Errors occurred at the trial in the admission and rejection of evidence.

Dated at Los Angeles, California, this 29 day of March, 1961.

WALTER M. CAMPBELL
668 S. Bonnie Brae Street
Los Angeles 57, California
Attorney for Appellants and
Petitioners

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Mar. 31, 1961. Frank H. Schmid, Clerk.